



# Ethics & Lobbying in New York State

## A Comprehensive Guide

2019 EDITION

NYS JOINT COMMISSION ON PUBLIC ETHICS





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## BRIEF HISTORY OF ETHICS LAWS IN NEW YORK STATE

Understand, I ain't defendin' politicians of today who steal. The politician who steals is worse than a thief. He is a fool. With the grand opportunities all around for the man with a political pull, there's no excuse for stealin' a cent. The point I want to make is that if there is some stealin' in politics, it don't mean that the politicians of 1905 are, as a class, worse than them of 1835. It just means that the old-timers had nothin' to steal while the politicians now are surrounded by all kinds of temptations and some of them naturally—the fool ones—buck up against the penal code.

— George Washington Plunkitt<sup>1</sup>

In the early 20th century, George Washington Plunkitt astutely observed that unless a public official committed a crime, the “People” had no recourse against a public official who simply acted badly. A public officer could only be liable if he (and there were few “shes”) engaged in conduct that could be classified as criminal, *i.e.*, stole, extorted, accepted a bribe. There were no statutory or regulatory norms of behavior. The body politic accepted only the first half of Dr. Martin Luther King Jr.'s dictum that “[m]orality cannot be legislated, but behavior can be regulated”<sup>2</sup> and did not bother with the latter.

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1 William Riordan, Plunkitt of Tammany Hall 32 (1963).

2 Cited by the Feerick Commission N.Y. State Comm'n on Gov't Integrity with an Introduction by John D. Feerick, Government Ethics Reform for the 1990's 592 (Bruce Green ed., 1991) (“Feerick Commission Report”). Dr. King went on to profoundly state, “So while the law may not change the hearts of men, it does change the habits of men.” New York's ethics laws are directed to habits, not hearts.

Outside of behavior that fell within the bounds of traditional criminal conduct, the law did not regulate the behavior of public officials or lobbyists.

Subsequently enacted codes of ethics—such as New York’s “Code of Conduct” as codified in Public Officers Law § 74—have attempted to regulate behavior, not change the hearts of public officers; they provide benchmarks against which conduct can be measured.<sup>3</sup> For the more mindful and decent, these are helpful guides which, if followed, help maintain public confidence. Bad conduct which goes well beyond the behavior proscribed by these norms is still subject to the criminal law.<sup>4</sup>

From their inception, New York’s ethics laws have been neither aspirational nor prescriptive. This can be contrasted with, for example, the legal profession’s Rules of Professional Conduct, which set positive standards of conduct. Rather, the ethics laws have been, and continue to be negative in nature and proscribe actions. Ultimately, a public officer’s legal duty is not to violate his or her oath of office. To further amplify this broad legal obligation, the government has created standards of conduct that are enacted through the democratic process filtered by the very individuals whom they regulate.

This is not an overview of the history of political corruption in New York. Rather, it reviews the legislative and regulatory mechanisms that regulate public ethics.<sup>5</sup> As such, it will consider the four sources for regulating public ethics in New York (1) the New York State Constitution (in its various iterations over the last two centuries); (2) Governor’s Executive Orders (unilaterally issued by the Executive and limited in application); (3) legislation (which is democratically enacted); and (4) the regulations that implement the law.

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3 For a critical view of the efficacy of ethics laws to alter behavior, a thoughtful consideration of fields other than law (such as sociology and public administration) to regulate public ethics and the impact of corruption on government operations, see Frank Aneciarico & James B. Jacobs, *The Pursuit of Absolute Integrity* (University of Chicago Press, 1996).

4 There is movement to strengthen New York’s Penal Law to include theft of “honest services” as a more comprehensive way of addressing truly egregious criminal conduct by public officials. That movement has been unsuccessful. See Andrew Stengel, *Albany’s Decade of Corruption: Public Integrity Enforcement after Skilling v. United States, New York’s Dormant Honest Services Fraud Statute, and Remedial Criminal Law Reform*, 76 Alb. L. Rev. 1357 (2013).

5 This book will not address the regulation of ethics at the municipal level which is in part regulated by General Municipal Law Article 18 and in New York City by its Charter and Administrative Code. Neither will it examine the regulation of ethics in the judicial branch. Members of the judiciary are subject to the jurisdiction of the Commission on Judicial Conduct established in article VI, § 22 of the New York State Constitution.

## A. Constitutional Roots

Harking back to New York's English antecedents, there has always been a method to remove public officials: impeachment. Short of impeachment or conviction of a crime (or in early English constitutional history, bills of attainder, which often resulted in truly permanent removal from the public and private scene), there were no statutory standards of ethical conduct in New York State until the waning years of the Dewey administration in 1954. For example, New York State's first state constitution in 1777, created a mechanism for removing state officers but no guidance as to what conduct, other than that which could be characterized as "mal and corrupt conduct in their respective offices," would serve as grounds for removal.<sup>6</sup>

Other officers have been subject to removal by the Governor for various reasons.<sup>7</sup> The 1846 Constitution, for example, provided that "[t]he treasurer may be suspended from office by the governor, during the recess of the legislature, and until thirty days after the commencement of the next session of the legislature, whenever it shall appear to him that such treasurer has, in any particular, violated his duty. The governor shall appoint a competent person to discharge the duties of the office, during such suspension of the treasurer." It continued the existence of the Court for the Trial of Impeachments, which was, and still is, the New York State Senate, and empowered the Assembly to, in essence, indict. But, the remedy imposed for these more heinous wrongful acts did "not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any office of honor, trust, or profit, under this state; but the party impeached shall be liable to indictment and punishment according to law."<sup>8</sup>

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6 Specifically, Articles XXXII, XXXIII and XXXIV of the 1777 Constitution established a Court for Impeachment and Trial of Errors and vested the power of impeaching "for mal and corrupt conduct . . . in the representatives of the people in assembly; . . . [which shall have power not extending] farther than to removal from office, and disqualification to hold or enjoy any place of honor, trust, or profit under this State. But the party so convicted shall be, nevertheless, liable and subject to indictment, trial, judgment, and punishment, according to the laws of the land."

7 See Bennett Liebman, "The Governor's Power of Removal: An Added Method of Ethics Enforcement in New York State" Government Law Center (Jun. 2, 2016). As Liebman, notes among the more well-known removals by a governor, was Governor Franklin Roosevelt's attempted removal of New York City Mayor James Walker in 1932. Walker resigned before the Governor made a decision but the power of removal was ensured. He also notes that Governor Herbert Lehman, in 1936, made last major removal determination (which was a decision to not remove the Kings County District Attorney).

8 N.Y. Const. of 1846, art. V, § 2; art. VI, § 1.

The power to impeach remains with the Legislature under the 1938 Constitution which, as amended in 1961 and 1962, remains in effect today.<sup>9</sup> The Attorney General also has authority under the ancient doctrine of *quo warranto* (codified at Executive Law § 63-a) to remove a public official from office who has committed some act which would forfeit that office. In addition, Article XIII, § 5 of the current Constitution empowers the Legislature to provide for “the removal for misconduct or malversation in office of all officers, except judicial, whose powers and duties are not local or legislative and who shall be elected at general elections, and also for supplying vacancies created by such removal.”

## B. Moreland Commissions and Early Lobbying Reform

Short of removal from office, exposure and transparency resulting in public opprobrium have been the tools for regulating public officials’ behavior. Notably, in 1907, the Legislature empowered the Governor to appoint special commissions to examine State governmental affairs—the so-called “Moreland Act Commissions” named after Sherman Moreland, Republican leader in the State Assembly. It survives as § 6 of the Executive Law which authorizes the Governor “at any time, either in person or by one or more persons appointed by him for the purpose, to examine and investigate the management and affairs of any department, board, bureau or commission of the state.” The commissions have been used to probe not only specific acts of wrongdoing and government processes but also to examine and investigate more systemic issues.<sup>10</sup> One

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9 N.Y. Const., art. VI, § 24: “The assembly shall have the power of impeachment by a vote of a majority of all the members elected thereto. The court for the trial of impeachments shall be composed of the president of the senate, the senators, or the major part of them, and the judges of the court of appeals, or the major part of them. On the trial of an impeachment against the governor or lieutenant-governor, neither the lieutenant-governor nor the temporary president of the senate shall act as a member of the court. No judicial officer shall exercise his or her office after articles of impeachment against him or her shall have been preferred to the senate, until he or she shall have been acquitted. Before the trial of an impeachment, the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence, and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust, or profit under this state; but the party impeached shall be liable to indictment and punishment according to law.” Other than the impeachment and removal of Governor William Sulzer in 1913, there have been no impeachments of Governors in New York.

10 A comprehensive study of the Moreland Act and the Commissions it has spawned, through 1965 is Breuer Ernest Henry, *Moreland Act Investigations in New York: 1907-65* (New York State Library 1965).

governor, Alfred E. Smith, appointed himself as “commissioner” on his own commission, there being no express statutory bar to such appointment.<sup>11</sup>

Although discussed in greater detail below where lobbying is examined, the public perception about lobbyists and the pernicious influence of their money on legislators has been the catalyst for ethics reform in New York State. At the turn of the 19th century, there were numerous corporate scandals that sensationalized and brought to light the power of corporate influence in campaigns and legislation.<sup>12</sup> In New York in 1905, a joint committee of the Senate and Assembly was “appointed to investigate the affairs of life insurance companies.” Senator William W. Armstrong chaired the committee (known as “the Armstrong Committee”), and had as its counsel Charles Evans Hughes, who followed his work on the Commission into office as Governor in 1906. Significantly, Governor Hughes was the driving force behind enacting the law permitting the creation of so-called “Moreland Act Commissions” in 1907.

The Armstrong Committee identified, among other abuses, the “systematic efforts of the large insurance companies to control a large part of the legislation of the State. . . . Enormous sums have been expended in a surreptitious manner . . . This course of conduct has created a widespread conviction that large portions of this money have been dishonestly used . . . The employment of agents to disburse large sums, and of clandestine methods to defeat legislation is wholly inexcusable.”<sup>13</sup>

The Committee’s solution to this problem was increased transparency and disclosure which, in turn, would lead to a more informed electorate which, in the progressive tradition, would result in better government. The Committee defined the issues in a timeless manner:

The pernicious activities of corporate agents in matters of legislation demand that the present freedom of lobbying should be restricted. They have brought suspicion upon important proceedings of the Legislature, and have exposed its members to consequent assault. The Legislature owes it to itself, so far as possible, to stop the practice of the lavish expenditure of moneys ostensibly for services in connection with the support of or

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11 For a comprehensive general discussion on gubernatorial involvement in Moreland Act Commissions, see Bennett Liebman, “The Participation of New York State Governors in Moreland Act Commissions” (Nov. 23, 2015). Albany Law School Working Papers Series No. 13 for 2015-16.

12 Note, Daniel Lipton, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 Va. L. Rev. 1912, 1913 (2010).

13 Report of the Joint Committee of the Senate and Assembly of the State of New York Appointed to Investigate the Affairs of Life Insurance Companies (“Armstrong Report”), at 394, 396 (1906).

opposition to bills, and generally believed to be used for corrupt purposes. The Legislature should free itself from the stigma which now attaches to the progress of measures affecting important interests. The laws against bribery and corruption, offenses which are difficult of proof, are sufficiently stringent, but an effort should be made to strike at the root of the evil by requiring under proper penalties full publicity with regard to moneys expended in connection with matters before the Legislature. Corporations should be required to keep accounts and vouchers in which all such payments should be fully detailed and receipted for, and an adequate statement regarding them should form a part of such reports as may be required.

\* \* \*

Professional services in promoting or opposing legislation may be entirely honorable and are frequently necessary [references made to legislation in Massachusetts and Wisconsin where it was a crime to accept a fee contingent on the passage of legislation or be paid to influence legislation]. . . . We are not inclined to recommend legislation on this subject which will interfere with the presentation to a legislator of the views of his constituents or of citizens general, but we believe that where legislation is opposed or promoted by paid professional advocates the matter should be the subject of suitable regulation.<sup>14</sup>

The Committee recommended that every person retained or employed to promote or oppose legislation or resolutions register with the Secretary of State and identify his client and a description of the subject of his lobbying. The Secretary of State would create a central register of this information for public viewing. It also recommended banning fees contingent on the passage or defeat of legislation and recommended requiring every corporation or association in New York to file with the Secretary of State a detailed list of all lobbying expenses incurred and paid. It would carve out exceptions from this registry for what we now term “government to government” lobbying and for those who provide professional bill drafting services. A misdemeanor would be imposed on those who violated the law.<sup>15</sup>

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14 Armstrong Report, at 396-97.

15 *Id.*, at 398.



### C. Governor Dewey and the First Code of Ethics

At least one commentator has noted that New York “was an early leader in the enactment of ethics legislation”<sup>16</sup> but formal, purely *ethics* (meaning non-lobbying) legislation did not appear for almost fifty years after the Armstrong Committee Report until Governor Thomas E. Dewey initiated the first statutory attempt to regulate public ethics outside of the regulation of corporate lobbying. This coincided with and was arguably a reaction to a major political scandal in 1953 which forced the Senate Majority Leader (and acting Lieutenant Governor) Arthur Wicks to resign.<sup>17</sup> At the Governor’s request, the Legislature established the “Special Legislative Committee on Integrity and Ethical Standards in Government.” What emerged in 1954<sup>18</sup> was the predecessor to current Public Officers Law § 74, the so-called “Code of Ethics” which applied to executive branch and legislative employees (although not legislators). The law’s legislative declaration of intent, quoted in full below, articulated and still articulates the need for clearly defined ethical standards of conduct for public officials:

A continuing problem of a free government is the maintenance among its public servants of moral and ethical standards which are worthy and warrant the confidence of the people. The people are entitled to expect from their public servants a set of standards set above the morals of the market place. A public official of a free government is entrusted with the welfare, prosperity, security and safety of the people he serves. In return for this trust, the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them.

Government is and should be representative of all the people who elect it, and some conflict of interest is inherent in any representative form of government. Some conflicts of material interests which are improper for public officials may be prohibited

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16 Newman, *New York’s Ethics Law: Turning the Tide on Corruption*, 16 Hofstra L. Rev. 319, 321 (1988).

17 See Bruce W. Dearstyne, *New York History: Legislative Scandals Often Lead to Meager Reform*, Gotham Gazette, Dec. 22, 2015, <http://www.gothamgazette.com/city/130-opinion/6046-legislative-scandals-often-lead-to-meager-reform> (referring to this scandal which arose out of criminal involvement in horse racing and other scandals which prompted reform movements).

18 “Report of the Special Legislative Committee on Integrity and Ethical Standards in Government,” Mar. 9, 1954.

by legislation. Others may arise in so many different forms and under such a variety of circumstances, that it would be unwise and unjust to proscribe them by statute with inflexible and penal sanctions which would limit public service to the very wealthy or the very poor. For matters of such complexity and close distinctions, the legislature finds that a code of ethics is desirable to set forth for the guidance of state officers and employees the general standards of conduct to be reasonably expected of them.<sup>19</sup>

Notably, the Legislature also enacted a new Public Officers Law § 73 which banned State employees, legislators, and legislative employees from owning a business interest above a certain threshold doing business with the State, as well as including a precursor to the current bar on State employees from appearing before their former agencies for two years after leaving State service. The “two-year bar” enacted in 1954 looked more like the current lifetime bar but a violation of that bar (along with violations of any provision of § 73) was a misdemeanor.<sup>20</sup>

#### **D. Governor Rockefeller’s Attempts at Reform**

In September 1962, Governor Nelson A. Rockefeller established a Moreland Act Commission to investigate “the relationship between corruption or misconduct and government, and to make recommendations for action to strengthen and improve practices and procedures relating to the faithful execution of the laws, with the [authority] . . . [t]o investigate generally the relationship between misconduct or corruption in office by public officials and the faithful execution of the laws by units of government in the State.”<sup>21</sup> No legislation resulted.

Again, in January 1964, Governor Rockefeller urged the Legislature to review any existing legislative code of ethics, identify conflicts of interest, and generally make recommendations in the area of legislative ethics. He noted that “[e]ven the appearance of impropriety must be scrupulously avoided . . . The public servant . . . is entitled to firm, clear and high standards for his guidance.”<sup>22</sup>

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19 Ch. 696, 1954 Leg., Section 1 (N.Y. 1955).

20 Ch. 695, 1954 Leg. (N.Y. 1954).

21 9 NYCRR 1.10 (1962) continued by Exec. Order No. 9 NYCRR 1.11 (1963).

22 Nelson A. Rockefeller, Governor, State of the State Address (Jan. 8, 1964).

Ultimately, with such prompting from the Governor and allegations about improprieties in the Legislature, a “Special Committee on Ethics” was established in 1964, headed by a former law partner of Governor Dewey, Cloyd Laporte (who chaired the New York City Board of Ethics), State Comptroller Arthur Levitt, and Professor Gray Thoron of Cornell Law School. As the *New York Times* described it, the Committee held hearings on ethics reform with emphasis on a legislative code of ethics before which appeared “a parade of witnesses—judges, politicians, legislators—[who] gave their views to the committee.”<sup>23</sup>

One such witness was Rabbi Alfred L. Friedman, chair of the legislative committee of the New York Board of Rabbis. In response to a suggestion that all that was needed to stifle unethical behavior was to amend the oath of office<sup>24</sup> to include an averment that the oath taker avoid conflicts of interest, he suggested that laws rather than oaths were needed to “educate and guide the uncertain conscience of some legislators who are presently unclear as to whether the taking of a gift from those who do business with the state, or are regulated by the state, is morally wrong.”<sup>25</sup>

The suggestion for a more comprehensive oath of office came from Robert Moses, who opined that there were “too many laws on the books of the most drastic and sometimes unrealistic character . . . [t]his conflict-of-interest hysteria . . . has gone so far it will drive out of politics and even government essentially decent people, especially young and struggling lawyers . . . ” He contended, “Mental honesty is what is needed . . . not a rigid moralistic code advocated by do-gooders or by politicians who have pushed away the ladder by which they rose and pretend that they reached the apex by some mysterious levitation or reverse gravity directed from above.”<sup>26</sup>

The Legislature did not adopt all of the recommendations of the Special Committee on Ethics (rejecting, for example, the ban on legislators practicing before the Court of Claims). Instead, it passed, and the Governor signed,

23 Robert Alden, *Liberals Demand Stiff Ethics Code*, N.Y. Times, Feb. 8, 1964.

24 New York State Constitution, article XIII, § 1 provides that “Members of the legislature, and all officers, executive and judicial, except such inferior officers as shall be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe [to the oath set forth in the Constitution] . . . , and no other oath, declaration or test shall be required as a qualification for any office of public trust. . . .”

25 *Id.*

26 *Id.*

legislation permitting legislators to continue to practice before state agencies and the Court of Claims, but nonetheless, it strengthened requirements that legislators report interests they have in any state regulated business and reaffirmed existing law against seeking or accepting gifts. The Governor described the bill as “a demonstrable improvement over existing law.”<sup>27</sup>

Significantly, it also established a legislative ethics committee in each house of the Legislature, created a separate code of ethics for legislators (albeit carved out from the Dewey-era general code of ethics in Public Officers Law § 74), and mandated certain financial disclosure, the violation of which was a misdemeanor if such violation consisted of a knowing and willful proffering of a false statement. It also transferred the crimes of “bribery of members of the legislature” and bribe receiving by legislators, from the Penal Law into the Legislative Law.<sup>28</sup> It created a new crime of receipt of unlawful fees and payments by legislators for performing their lawful duties (a felony) and made it a crime to unlawfully receive a gift from a legislator (a misdemeanor).<sup>29</sup>

### **E. Post-Watergate Era and Governor Carey**

The State’s first concrete steps towards mandating financial disclosure were taken outside of statute by Governor Hugh Carey on May 22, 1975, in Executive Order 10<sup>30</sup> (which inherently could only apply to executive branch public officers). In that Executive Order, the Governor required policymakers (as determined by the Governor), and exempt non-competitive or unclassified State employees earning \$30,000 per year or more and such other State officers who he appointed or nominated, to file a financial disclosure statement in a form prescribed in the Order (all of which could have information redacted therefrom). It barred filers from engaging “in any activity which interferes or is in conflict with the proper and effective discharge of such person’s official duties,” holding any outside employment or directorships, or acting as officers of political parties and organizations without prior approval of an

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27 Laymond Robinson, *Governor Signs Slate Voting Bill*, N.Y. Times, Apr. 26, 1964. Cong. 941, 1964 Leg. (N.Y. 1964).

28 Although those bribery crimes have rarely been used, they still exist as Public Officers Law §§ 75 and 76.

29 The first of these crimes still exists as Public Officers Law § 77. The second crime, which was Legislative Law § 83 no longer exists.

30 Exec. Order No. 10, 9 NYCRR 3.10 (1975).

Executive-established Board of Public Disclosure. Such Board would be housed in the Department of State and consist of seven members: the Secretary of State (who was Mario Cuomo), Secretary to the Governor, Counsel to the Governor, and four others (who could not be holders of any public office and included, among others, Daniel Gutman, former Counsel to Governor Averell Harriman), one of whom the Governor would designate as chair (its first chair was Charles S. Desmond, former Chief Judge of the New York Court of Appeals). The Board had broad discretion to evaluate gubernatorial appointees and “evaluate th[eir] financial interests . . . to determine whether there are any actual or potential conflicts of interest” and to advise the Governor of its findings.

The New York Court of Appeals, in affirming the Governor’s authority to require such disclosure<sup>31</sup> looked toward the Appellate Division’s finding that “in our system of government no State interest is more compelling than the assertion of the right of the public to have relevant information concerning the conduct of its government and its employees.”<sup>32</sup>

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31 *Evans v. Carey*, 40 N.Y.2d 1008-9, 359 N.E.2d 983, 391 N.Y.S.2d 393 (1976) (“Rather than rely on such cases as *California Bankers Assn. v. Shultz* (416 U.S. 21), *United States v. Miller* (425 U.S. 434), *Fisher v. United States* (425 U.S. 391), and *Buckley v. Valeo* (424 U.S. 1), each of which involves an unsuccessful challenge to a governmental requirement or governmental demand directing a third party to maintain records or disclose information, we rest instead on the authority of cases such as *United Public Workers v. Mitchell* (330 U.S. 75), *Civil Serv. Comm. v. Letter Carriers* (413 U.S. 548), *Broadrick v. Oklahoma* (413 U.S. 601), and *Illinois State Employees Assn. v. Walker* (57 Ill.2d 512, cert. den. *sub nom. Troopers Lodge No. 41 v. Walker*, 419 U.S. 1058) where, as here, the rights and interests of government employees, as citizens, were balanced against the rights and interests of the government, as employer. The Executive Order requiring financial disclosure was designed to eliminate inefficiency and deter official corruption, significant public interests, and does not infringe upon individual employees’ constitutional rights.”). But the Court struck down a New York City local law that gave “unimpeded access” to financial disclosure statements. *Hunter v. City of New York*, 44 NY2d 708 (1978), *aff’d* 59 AD2d 136 (1st Dep’t 1977), (. . . [T]he local law challenged is, to the extent it ignores due process, invalid. Local Law No. 1 provides that the required detailed disclosure be filed with the City Clerk, and be made available to the public. It permits anyone, for any reason or no reason, unimpeded access to the financial disclosures of the municipal employees, even where the financial information may have no conceivable relationship to any of the duties of employment. Matters of finance do exist that are so personal in nature and so unrelated to the performance of a public servant’s duties, that no useful purpose is to be served by its disclosure. On the contrary, embarrassment may be visited upon the employee for no discernible reason other than to satisfy the curiosity of others. It is suggested that the local law, yet another statute attempting to legislate ethics, may well lie within the competence of the local legislative body to enact. It should, however, be enacted with a view to preserving to the maximum extent possible the right enjoyed by the body politic at large to keep their financial affairs private, consistent with the new-found fervor of the public to know everything about everybody. The right to shield from one’s friends as well as one’s critics details that have no bearing whatsoever upon the performance of the employee’s duties should be accorded to the employee.”).

32 *Evans v. Carey*, 53 A.D.2d 109, 118, 385 N.Y.S.2d 965 (4th Dep’t 1976).

The Court of Appeals later struck down that portion of the Executive Order which applied to State employees other than heads of departments, agencies, and others who serve strictly at the pleasure of the Governor. It noted that such an unilateral exercise of Executive authority over public officers other than those who served at the pleasure of the Governor was unconstitutional.<sup>33</sup>

Governor Carey subsequently amended his order.<sup>34</sup> Ultimately, he empowered his Board to promulgate its own financial disclosure form rather than the one prescribed in his Order. After reducing the salary threshold to \$25,000, he dispensed with that threshold and directed the Board to look at the newly enacted, post-Watergate federal “Ethics in Government Act of 1978” for guidance in promulgating financial disclosure statement forms. The final iteration of the Executive Order, among other actions, barred policymakers and heads of departments and agencies from becoming candidates and campaigning for public office.

## **F. Governor Mario Cuomo and the First Comprehensive Statutory Ethics Regimen**

Upon taking office in 1983, Governor Mario Cuomo revoked Governor Carey’s Executive Order and reestablished the Board of Public Disclosure with parameters similar to those initially established by Governor Carey. Notably missing was the bar on policymakers and heads of departments and agencies from becoming candidates and campaigning for office.<sup>35</sup> More fruitful actions were taken soon thereafter.<sup>36</sup>

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33 Rapp v. Carey, 44 N.Y.2d 157 (1978) (“The issue is whether under the State Constitution the Governor may, by executive order, without benefit of authorizing legislation, mandate on State employees, many not subject to removal by the Governor, the filing of financial disclosure statements, and the abstention from activities not prohibited by statute. Not at issue is the wisdom of requiring such statements and prohibiting the proscribed activities, or the hardly doubted power to impose such requirements by appropriate legislation. There should be an affirmance [of the Appellate Division opinion striking down the Executive Order]. Neither in the Constitution nor in the statutes is there express or implied authority for the Governor to exact of State employees compliance with the requirements of Executive Order No. 10.1. Nor does the Governor’s order merely implement existing legislation relating to conflicts of interest. The order reaches beyond that, and assumes the power of the Legislature to set State policy in an area of concededly increasing public concern.”)

34 In total, Carey amended the Executive Order three times: Exec. Order No. 10.1, 9 NYCRR 3.10.1 (1976) amended by Exec. Order No. 10.2, 9 NYCRR 3.10.2 (1978) amended by Exec. Order No. 10.3, 9 NYCRR 3.10.3 (1981).

35 Exec. Order No. 3, 9 NYCRR 4.3 (1983).

36 For a brief survey of legislation introduced in the Legislature (which subsequently only the Assembly passed in 1986) during the Cuomo administration before the Moreland Commission made its final recommendations, see Robert C. Newman, *New York’s New Ethics Law: Turning the Tide on Corruption*, 16 Hofstra L. Rev. 319, 326-28.

In March 1986, Governor Cuomo and New York City Mayor Ed Koch established the “State-City Commission on Government Integrity” chaired by Dean Michael Sovern of Columbia University Law School. The Sovern Commission recommended, among other things, the appointment of a non-partisan commission to investigate corruption at both the State and local levels. In response to that call, Governor Cuomo, by Executive Order established a Moreland Act Commission with additional authority pursuant to Executive Law § 63(8), “to investigate instances of corruption in the administration of government, [and] to determine the adequacy of laws, regulations and procedures relating to government integrity.”<sup>37</sup> As originally constituted, the commission was chaired by former cabinet secretary Joseph Califano, who was subsequently replaced by Dean John D. Feerick, Jr. of Fordham University in response to the Legislature’s objections that Commission members be residents of New York. The commission became known as the “Feerick Commission.”<sup>38</sup> The Governor charged the Commission with investigating the “adequacy of laws, regulations and procedures relating to maintain ethical practices and standards in government, assuring that public servants are duly accountable for the faithful discharge of the public trust reposed in them, and preventing, favoritism, conflicts of interest, undue influence and abuse of official position, and [making] recommendations for action to strengthen and improve such laws, regulations and procedures.”<sup>39</sup> The Commission investigated, took testimony, and released 20 reports over 40 months.

Ultimately, the most tangible fruit of the Feerick Commission’s labors were two comprehensive pieces of legislation in 1987: the “Ethics in Government Act” and “New York State Governmental Accountability, Audit and Internal Control Act of 1987.”<sup>40</sup> The “Ethics in Government Act” established the State

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37 Exec. Order No. 88, 9 NYCRR 4.88 (1987) revoked and replaced by Exec. Order No. 88.1, 9 NYCRR 4.88.1 (1987).

38 Feerick Commission Report, at 2. Governor Eliot Spitzer subsequently appointed Dean Feerick to chair the New York State Ethics Commission on April 16, 2007. He went on to become the first chair of the Commission on Public Integrity when it began on Sep. 22, 2007 by merging the Ethics Commission and the New York Temporary State Commission on Lobbying.

39 Exec. Order No. 88, 9 NYCRR 4.88 para. 1 (1987). The operation of the Feerick Commission engendered a great deal of litigation over the Commission’s authority. For a good general description of the litigation, see B. Liebman, “The Case Law under the Moreland Act,” Government Reform (Government Law Center at Albany Law School), May 20, 2015.

40 Ch. 813, 1987 Leg. (N.Y. 1987); Ch. 814, 1987 Leg. (N.Y. 1987). The New York State Governmental Accountability, Audit and Internal Control Act mandated internal control mechanisms and periodic audits by independent auditors for all governmental entities.

Ethics Commission for all executive branch employees with the power to receive complaints, initiate investigations, issue subpoenas, and refer matters to prosecutors. It also established the Legislative Ethics Committee for legislative branch employees and legislators. For municipalities, it set up the “Temporary Commission on Local Government Ethics” to look at more local ethics issues.<sup>41</sup> It formalized, for the first time, so-called “revolving door” bans and mandated financial disclosure for executive branch and legislative employees, as well as political party state chairs and candidates for statewide elected offices. The New York courts have upheld the constitutionality of these laws and their impact on public officers.<sup>42</sup>

While the Governor and others hailed the measure, some sharply criticized the legislation. Attorney General Robert Abrams, for example, noted that while it limited many appearances by state officials and legislators before state agencies, a total bar on such appearances would be far more effective. In particular, it still permitted such individuals to appear in quasi-judicial proceedings conducted by the Workers Compensation Board, the Department of Environmental Conservation, and the Department of State. Moreover, the law made filing a false financial disclosure statement subject only to civil sanctions to be imposed exclusively by the State Ethics Commission or Legislative Ethics Committee, rather than subjecting such conduct to the Penal

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41 In 1991, the Temporary Commission issued a report, made recommendations and subsequently expired. See New York State Bar Association, *Report of N.Y. State Bar Ass’n Task Force on Gov’t Ethics*, at 11 (2011).

42 The new law, as opposed to a unilaterally imposed Executive Order, addressed those concerns raised in *Rapp v. Carey*, discussed *supra*. See *Watkins v. New York State Ethics Com.*, 147 Misc. 2d 350, 554 N.Y.S.2d 955 (Sup. Ct. Albany Co. 1990) (“It is clear that the mere fact that plaintiff is a governmental employee does not mean he is completely devoid of constitutional protection. [citation omitted] However, it is clear also that in matters of financial disclosure, government employees and public officials, due to the significant governmental interest in ensuring the integrity and honesty of government and in fostering public confidence in same, have a diminished expectation of privacy as compared to their counterparts in private industry. [citation omitted]”); *Grygas v. New York State Ethics Com.*, 147 Misc. 2d 312, 554 N.Y.S.2d 779, (Sup. Ct. Albany Co. 1990) (“Where the legislature determines that there shall be an Ethics in Government Law in New York and what form it will take, and that there shall be a financial disclosure requirement for state employees, and determines the parameters of inclusion, namely, those who have ‘policymaking’ duties, a category clearly susceptible to that extrinsic corruptive influence sought to be done away with, and a further category based on a threshold compensation, on the theory that the greater the compensation of a state employee, the more likelihood that his duties will rise to the level of importance at which extrinsic corruption becomes a reasonable and realistic danger, all that is left to the administrative agencies is to decide which persons fit within the law, there is no delegation of legislative power. The determination of who is a policymaker is uniquely an administrative function.”)



Law where knowingly filing a false statement is a misdemeanor. Joining in the criticism was Dean Feerick, who noted many of these same defects, citing them as inadequate to prevent corruption.<sup>43</sup>

## **G. The Public Employee Ethics Reform Act of 2007**

Outside the arena of lobbying reform, discussed below, the next major ethics overhaul took place during Governor Eliot Spitzer's abbreviated term. Upon entering office in 2007, he promulgated an Executive Order strictly limiting, and in many cases banning, gifts and the use of State property by government employees, banning nepotism in hiring, and barring former Executive Chamber employees from appearing or practicing before any executive branch agency or public authority for two years upon leaving public service.<sup>44</sup> He also issued a separate order entitled "Eliminating Politics from Government Decision Making" barring every individual covered by the Executive Order from making "any monetary contribution to the campaign of the Governor or the Lieutenant Governor, or to any political campaign committee organized by or for the specific benefit of the Governor or the Lieutenant Governor." He also barred the use of political affiliation as a factor in making any personnel decisions, barred elected officials or candidates for elective office from appearing in advertisements on public media if paid for in whole or in part with public money, and barred heads of agencies and public authorities from running for public office while holding such public positions.<sup>45</sup>

Without public hearings, vetting, or relying on at least the recommendations of a quasi-independent body (such as the Feerick Commission), very early in his administration, Governor Spitzer introduced a program bill that was subsequently enacted as the "Public Employee Ethics Reform Act of 2007."<sup>46</sup> The legislation came on the heels of criminal charges lodged against State Comptroller Alan Hevesi and other charges against members of the State Legislature.

Notably, it abolished the State Ethics Commission and the Temporary State Commission on Lobbying and merged them into a single Commission on Public Integrity, thereby combining oversight of lobbyists and the executive

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43 Associated Press, *Commission Criticizes New York's Ethics-in-Government Act*, Apr. 10, 1988.

44 Exec. Order No. 1, 9 NYCRR 6.1 (2007). Although Governor David Paterson did not continue this Order, he promulgated his own Order continuing the limitations on use of State property and the ban on campaign contributions by individuals who serve in government at the pleasure of the Governor. Exec. Order No. 7, 9 NYCRR 7.7 (2008).

45 Exec. Order No. 2, 9 NYCRR 6.2 (2007).

46 Ch. 14, 2007 Leg. (N.Y. 2007).

branch into a single entity. The Commission on Public Integrity was composed of thirteen commissioners, seven of whom were appointed by the Governor (only four of whom could be of the same political party), and the six remaining commissioners were appointed by the Governor on recommendation of each of the conference leaders in the Legislature and the Attorney General. The legislation's other major reforms included revising the gift provisions of the Public Officers Law; barring receipt of many honoraria; prohibiting nepotism in hiring; prohibiting certain officials from appearing in taxpayer-funded advertisements; expanding the definition of "public official" for purposes of the Lobbying Act; banning lobbyists from entering into contingent fee arrangements; extending jurisdiction over state officers and employees for ethics law violations to one year from when they leave State service; and modifying the two-year bar revolving door provisions in Public Officers Law § 73 so that the bar would commence and run for two years from the date a legislator or legislative employee left the Legislature, rather than simply terminate with the end of the legislative session in which such person was employed.

The Public Employee Ethics Reform Act of 2007 also dissolved the Legislative Ethics Committee and replaced it with the Legislative Ethics Commission. Like the Commission on Public Integrity, it was authorized to issue advisory opinions and enforce the Public Officers Law in the Legislature. It was comprised of nine members, with each of the four major conferences appointing one member (a member of the Legislature), one member (not a member of the Legislature) jointly appointed by the Speaker of the Assembly and the Senate Majority Leader, and the remaining four being non-members of the Legislature appointed by the four major conference leaders.

Needless to say, further scandals enveloped both the executive and legislative branches of government.<sup>47</sup> These included the indictment and conviction of Senate Majority Leader Joseph Bruno (whose conviction was subsequently reversed) and Assemblyman Anthony Seminerio, as well as Governor Spitzer's resignation. Criticism of the Legislative Ethics Commission reached a crescendo during this period because of its inaction, as did criticism of both the Commission on Public Integrity and the Office of the Inspector General in the so-called "Troopergate" matter involving, among other things, the use of a State airplane

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47 For a brief background on what occurred during these intervening years and on Governor Paterson's proposal, *see* Reforming N.Y. State's Ethics Laws the Right Way: Report of the N.Y.C. Bar Ass'n Comm. on State Affairs and Comm. on Gov't Ethics (2010).

and the investigation conducted by the Executive and the New York State Police into that matter. In May 2009, the New York State Inspector General issued a scathing report detailing alleged ethics violations by members of the Commission on Public Integrity and Governor Spitzer's staff.<sup>48</sup>

Governor David Paterson attempted to address these issues in Governor's Program Bill No. 31 in which he proposed replacing the Commission on Public Integrity. Ultimately, the Legislature did not rely on his initiative, but passed its own legislation which would have (1) established a new independent State Commission on Lobbying to be known as the "New York State Commission on Lobbying Ethics; (2) replaced the Commission on Public Integrity with the "Executive Ethics and Compliance Commission" to oversee ethics compliance by the executive branch; (3) replaced the Legislative Ethics Commission with the "Joint Legislative Commission on Ethics Standards" which, like the Legislative Ethics Commission, would have been responsible for advisory opinions, financial disclosures, ethics training and education, and overseeing compliance with the Public Officers Law; and (4) established a new "Legislative Office of Ethics Investigations" responsible for assisting the Legislature to carry out its investigatory and enforcement responsibilities with regard to ethical standards. It would receive referrals of complaints for investigations from the Joint Legislative Commission on Ethics Standards, the Standing Committees on Ethics in both houses of the Legislature, as well as complaints from the public. It would also have clarified definitions in the Lobbying Act and made numerous changes to the Election Law.<sup>49</sup>

Governor Paterson vetoed the bill noting, among other things, that it vested the entire decision making and investigatory process for ethics enforcement for the Legislature *with* the Legislature. The old Legislative Ethics Commission had a non-legislative majority of five to four; the proposed new body would be evenly divided. In his veto message, the Governor also cited the restricted jurisdiction of the newly conceived "Commission on Lobbying Ethics" that placed into question whether it could enforce the Lobbying Act.<sup>50</sup> The

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48 "An Investigation of an Allegation That Herbert Teitelbaum, Executive Director of the Commission on Public Integrity, Inappropriately Disclosed Confidential Commission Information Related to Its Troopergate Investigation And An Investigation of the Appropriateness of the Commission on Public Integrity's Response Upon Receiving the Allegations Against Its Executive Director," Report of Joseph Fisch New York State Inspector General (2009).

49 Assemb. 9544, S. 6457, (N.Y. 2010) vetoed at Veto Message No. 1 (Feb. 1, 2010).

50 *Id.*

Legislature attempted and failed to override the veto. The Governor, as an alternative in 2010, proposed his own “Reform Albany Act,” which the Legislature never acted upon.<sup>51</sup>

## H. Governor Andrew Cuomo: Ethics Reform from 2011 through 2016

Thus, when Governor Andrew Cuomo came into office in 2011, he was left with a legacy of scandals and a history of attempts at legislating public ethics. His response, in which the Legislature joined after months of negotiations, was the Public Integrity Reform Act of 2011.<sup>52</sup> This was a comprehensive approach to ethics and ethics-related issues. It not only amended the Public Officers Law, but also enacted the first pension forfeiture law in New York’s history (albeit limited to certain public employee retirement plans and strictly prospective in application). It fundamentally altered the structure of ethics enforcement in New York.

First, it abolished the Commission on Public Integrity and replaced it with the Joint Commission on Public Ethics (“JCOPE”), which also subsumed the investigative function of the Legislative Ethics Commission and the authority of the Temporary Commission on Lobbying. This became the first administrative agency in New York with jurisdiction over not only executive branch ethics and lobbying, but the Legislature, its members, and employees as well. However, its structure and voting quorum requirements, which are discussed in greater detail *infra*, have been severely criticized.<sup>53</sup>

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51 In 2010, Public Officers Law § 74, subd. 3, para. d was amended to read as follows: “No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his *or her* official position to secure unwarranted privileges or exemptions for himself *or herself* or others, *including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes.* [emphasis on amended added language]” Ch. 1, 2010 Leg. (N.Y. 2010). Ostensibly, this amendment to the Code of Ethics was enacted to address “a gap in state law, which does not explicitly prohibit mixing state business and private business. [Thereby]. . . clarify[ing] state law by explicitly banning individuals from using government property, services or other resources for private business purposes.” Sponsor’s Memorandum in Support of S. 6439 (2010). However, the Executive Director of the Commission on Public Integrity in requesting that the Governor veto the bill, noted that his Commission and the courts had historically and recently broadly construed the existing version of the subdivision to already include such behavior so that the added language was superfluous. (Memorandum of Barry Ginsberg to Peter J. Kiernan regarding S. 6439, Jan. 29, 2010, Bill Jacket of Ch. 1, 2010 Leg.).

52 Ch. 399, 2011 Leg. (N.Y. 2011).

53 See The N.Y. Ethics Review Comm’n of the Joint Comm’n on Pub. Ethics and the Legis. Ethics Comm’n: Report and Recommendations (“Review Commission Report”) (2015) wherein such criticisms are noted.

The Public Integrity Reform Act of 2011 expanded disclosure of clients by those who must file financial disclosure reports where there was no such disclosure previously. This included mandating disclosing names of clients for whom reporting individuals perform services where such services were before a State agency or in connection with legislation. In addition, more precise information was required about income earned by filers. The law also mandated online public posting of elected officials' financial disclosure forms for easy public access. The law further clarified the provisions of the gift ban (including the definition of exceptions to the ban such as attendance at "widely attended events"). It amended the Lobbying Act to require that lobbyists and lobbying clients disclose sources of funding (with some carefully crafted exceptions).

The public demand for even further reform was whetted with Governor Cuomo establishing, with great fanfare, under the Moreland Act and Executive Law § 63 (8) as well as Article IV, § 3 of the New York Constitution, "The Commission to Investigate Public Corruption."<sup>54</sup> The Commission issued only a preliminary report in December 2013 with some preliminary recommendations. It was subsequently disbanded and issued no final report amid accusations of Executive Chamber interference. Public outcry prompted an investigation by the United States Attorney for the Southern District of New York, who ultimately "concluded that, absent any additional proof that may develop, there is insufficient evidence to prove a federal crime"<sup>55</sup> by the disbanding of the Commission.

In March 2014, the second of three major ethics law overhauls initiated by the Cuomo administration was implemented. Entitled the "Public Trust Act,"<sup>56</sup> it primarily addressed issues outside of the Public Officers Law. While it amended the financial disclosure law to expand reporting of outside business activities by requiring disclosure of clients of filers who are referred by lobbyists if more than \$10,000 in compensation resulted, its most profound impact were amendments to the Penal Law and Election Law.

It significantly revamped the Penal Law by, among other things, equating the sentences upon conviction for bribery and attempted bribery (where the People need not establish a quid pro quo), raising the penalties for bribery and

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54 Exec. Order No. 106, 9 NYCRR 8.106 (2013).

55 See, e.g., Susanne Craig et. al., *Cuomo's Office Hobbled Ethics Inquiries by Moreland Commission*, N.Y. Times, July 23, 2014, to get an idea of what was swirling in the media at that time; Preet Bharara, U.S. Attorney, Statement Relating to Moreland Commission Investigation (Jan. 11, 2016).

56 Ch. 55, 2014 Leg., Part H (N.Y. 2014).

other crimes, and mandating debarment from holding public office upon conviction of certain enumerated offenses. It also created a series of new crimes—primarily penalty enhancements when public officers and their accomplices are involved—under the new headings of “Corrupting the Government” and “Public Corruption.” Finally, it amended the Election Law by increasing the disclosure and reporting requirements of independent expenditures, establishing a pilot program of publicly financing the 2014 race for State Comptroller (in which no candidate subsequently participated) and creating an independent chief enforcement counsel and statutorily mandated compliance office within the Board of Elections.

Following these reforms, the United States Attorney for the Southern District of New York indicted both the Speaker of the Assembly, Sheldon Silver, and the Majority Leader of the Senate, Dean Skelos, for engaging in activities involving favors procured and, in some cases, money earned (illegally, as the juries subsequently found) outside of their government salaries.<sup>57</sup> Needless to say, the public and press looked to the Governor and Legislature to address the latest scandals.

A legislative response was enacted in the context of the 2015-16 State Fiscal Year Budget in March, 2015.<sup>58</sup> That law significantly broadened public disclosure of outside earned income by all filers (elected and non-elected officials, including members of per diem boards). It amended Public Officers Law § 73-a to mandate disclosure of actual services performed to receive income and whether there was any connection between such services and public duties. All public officials were mandated to disclose each source of income greater than \$1,000 and barred from receiving any kind of compensation, directly or indirectly, in connection with pending legislation.

In addition, all public officials who personally provide services individually or as a member of, or employee of, a firm (such as an attorney or real estate broker), and receive compensation from a client or customer greater than \$5,000, must disclose the name of each such client, services rendered, the amount of compensation, and whether such services were related to governmental action. Representation in certain sensitive activities was exempted from disclosure, such as child custody cases, preparation of wills, matrimonial proceedings, cases

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57 Both Silver and Skelos were convicted and their convictions are on appeal.

58 Ch. 56, 2015 Leg., Part CC (N.Y. 2015).

involving minors, bankruptcies, criminal proceedings, and residential home closings. The law empowers the Office of Court Administration, along with JCOPE (which remained the repository for financial disclosure filings), to determine if circumstances do not warrant the disclosure of the name of a particular client.

The reforms also expanded the scope of the Lobbying Act to cover lobbying municipalities with a population of 5,000 or more (lowering the threshold from 50,000). It also amended the Election Law, limiting the permissible uses of campaign funds and expanding the disclosure of so-called “independent expenditures.” The Legislative Law governing legislative per diem accruals was also amended.

The most recent spasm of reform came in the waning hours of the 2016 legislative session with the enactment of Governor’s Program Bill No. 39.<sup>59</sup> In addition to further amending the Election Law and requiring that “political consultants” register with the Department of State, the law significantly expanded the disclosure of sources of funding of lobbying activities. Specifically, the law lowered the threshold for disclosing sources of funding to a contribution of over \$2,500; prior to January 2017, that number was \$5,000. Additionally, whereas so-called Section 501(c)(3) entities did not have to disclose sources of funding if engaged in lobbying, the 2016 laws mandated that if such an entity provided in-kind contributions (which the law defined to include money) to a Section 501(c)(4) entity otherwise engaged in lobbying as a client or lobbyist, then the (c)(3) entity would have to disclose its sources of funding, albeit to the Attorney General and not to JCOPE. The Attorney General is empowered to exempt entities from disclosing sources if such disclosure “may cause harm, threats, harassment, or reprisals to the source of the donation or to individuals or property affiliated with the source of the donation.”<sup>60</sup> The law would require JCOPE to post the sources of funding of (c)(3) entities that fund the lobbying activities of (c)(4) entities. This is being challenged in federal court.<sup>61</sup>

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59 Ch. 286, 2016 Leg., with Approval Memo No. 4 (N.Y. 2016).

60 N.Y. Exec. Law §§ 172-e, 172-f. Such disclosure would be required even if the (c)(4) is not engaged in lobbying activities as defined by the Lobbying Act but is otherwise engaged in communicating or making statements on issues or candidates (if such statements would not otherwise qualify as “independent expenditures” under the Election Law).

61 *Citizens Union of N. Y. et al. v. The Governor of N. Y.*, 16-CV-9592 (S.D.N.Y.); *Am. Civil Liberties Union Found., Inc. et al. v. Seth H. Agata, et al.*, 16-CV-9854 (S.D.N.Y.).

No doubt, state regulation of public ethics will continue to evolve. In many instances, the issues of public corruption and the pernicious influence of lobbyists and money are the same that existed in the early 20th century.

The Public Integrity Reform Act of 2011 provided that a commission be established three years after enactment to review and evaluate the activities and performance of JCOPE and the Legislative Ethics Commission.<sup>62</sup> The New York Ethics Review Commission was ultimately established in May 2015 and, after holding public hearings and soliciting comments, issued its final report in November 2015.<sup>63</sup> Among its observations, the Review Commission found that “JCOPE is most like a conflicts of interest board, rather than a public integrity law enforcement agency which would focus exclusively on combatting public corruption, a role which belongs to the Office of the Inspector General, the Office of the Attorney General, and the Office of the U.S. Attorney.”<sup>64</sup> It recommended a number of changes to JCOPE and the Legislative Ethics Commission, including profound changes to size, governance, administration and composition, more openness to JCOPE’s operations consistent with due process, improvement in time frames in responding to queries, and a stronger effort between the Legislative Ethics Commission and JCOPE to harmonize their opinions and guidance on matters arising under the Public Officers Law. The entire field of local municipal ethics also remains open, prompting at least some executive branch interest.<sup>65</sup>

Returning to Dr. King’s profound observations, no doubt there will continue to be scandals that will prompt legislation. And, no doubt, we will continue to try to regulate behavior and not legislate morality or change the hearts of men and women. Legislation certainly cannot accomplish the latter.<sup>66</sup>

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62 Ch. 399, 2011 Leg., Part A § 21 (N.Y. 2011).

63 The N.Y. Ethics Review Comm’n of the Joint Comm’n on Pub. Ethics and the Legis. Ethics Comm’n: Report and Recommendations (2015).

64 *Id.*, at 3.

65 John D. Feerick et. al., *Municipal Ethical Standards: The Need for a New Approach*, 10 Pace L. Rev. 107, 618 (1990); Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 Pace L. Rev. 243 (1991). Governor Cuomo’s Executive Budget submission included not only proposed amendments to the Public Officers Law regulating outside employment by legislators, but amendments to the Executive Law mandating that financial disclosure statements be prepared and filed by a fairly broad array of municipal officers with JCOPE. Assemb. 2010, S. 2010 (N.Y. 2017).

66 See Beth Rosenson, *The Costs and Benefits of Ethics Laws*, 8 Int’l Pub. Mgmt. J. 209 (2005) for a critique and analysis of ethics laws and their benefits.



## **ETHICS ENFORCEMENT OVERVIEW**

### **A. Jurisdiction and Authority**

The Public Integrity Reform Act of 2011 established the Joint Commission on Public Ethics (“JCOPE”) to oversee and regulate ethics and lobbying in New York State; it began operation on December 14, 2011. Accordingly, JCOPE has broad regulatory authority and oversight over officers and employees at State agencies and departments, including commissions, boards, State public benefit corporations, public authorities, State University of New York, City University of New York, and the statutory closely affiliated corporations; the four statewide elected officials and members of the Legislature (and candidates for those offices); employees of the Legislature; certain political party chairpersons; and registered lobbyists and their clients.

JCOPE’s purpose, as set forth in its enabling statute, Executive Law § 94, is to provide information, education, and advice regarding the State’s ethics laws (Public Officers Law § 73, which delineates specific restrictions on activities of certain public officials; § 73-a, which requires certain officials to provide annual statements of financial disclosure concerning their personal and financial interests; and § 74, which sets forth a Code of Ethics addressing actual and apparent conflicts of interests), the “Little Hatch Act” (Civil Service Law § 107, which prohibits certain activities based on political considerations); and the Lobbying Act (Legislative Law Article 1-A, which requires, among other things, that lobbyists and clients report their lobbying activities). JCOPE promotes compliance with these laws through education and training, audits, investigations, and enforcement proceedings. Additionally, JCOPE fosters

transparency by making the required disclosures filed by the people and entities it oversees publicly available.

On a daily basis, JCOPE provides written and verbal guidance to State agency ethics officers, current and former State employees, lobbyists and clients of lobbyists. Annually, it provides written guidance on more than 500 inquiries, including informal opinion requests, outside activity requests, and travel reimbursement requests; the typical time for a written response to a request for guidance is five to seven days. In addition to these activities, JCOPE has focused on improving the information available to State officers and employees, with an emphasis on providing clear guidance and a reasonable application of the law. It has developed an extensive training and outreach program consisting of formal training sessions for agency ethics officers and State officers and employees; informal roundtable discussions and forums with agency ethics officers; a semi-annual newsletter; pamphlets that provide an overview of key areas of the Public Officers Law; and periodic one-page publications highlighting various obligations for individuals covered by the Public Officers Law.

JCOPE also provides assistance and guidance to financial disclosure statement filers and works closely with other agencies to achieve compliance with legal requirements. Each year it works with agencies to identify filers, notify filers of their disclosure requirements, process filings (approximately 35,000 annually), and ensure compliance.

Oversight of lobbying in the State includes processing and reviewing more than 50,000 mandated filings submitted on an annual basis by nearly 8,000 registered lobbyists and their more than 5,000 clients. JCOPE also provides a technical support helpdesk for its online filing system, answers phone and email queries on filing best practices, and carries out hundreds of statutorily-required random audits of filings each year. In addition to administering filings, JCOPE has developed a dialogue with the regulated community and the public on lobbying matters to improve its training and guidance on the Lobbying Act.

On an annual basis, JCOPE processes more than 200 matters concerning potential violations of the laws under its jurisdiction. In general, allegations cover a broad range of conduct, including conflicts of interest, improper gifts, nepotism, failure to file financial disclosure statements, and post-employment issues, which may result in penalties under the Public Officers Law. In addition,

JCOPE pursues violations of the Lobbying Act, including failure to register as a lobbyist or submit required disclosure reports.

## **B. The Agency**

The Commission consists of 14 members, three appointed by the Republican Leader of the Senate; three appointed by the Democratic Leader of the Assembly; one appointed by the Democratic Leader of the Senate; one appointed by the Republican Leader of the Assembly; and six appointed by the Governor and the Lieutenant Governor. Commissioners serve five-year terms as set forth in Executive Law § 94. The Commission meets, at a minimum, bi-monthly, but in practice, it meets regularly on a monthly basis.

JCOPE maintains a statewide presence with offices in Albany, New York City, and Buffalo, extending its access to State officers, employees, elected officials, lobbyists and clients located throughout the state. The Commission appoints an Executive Director to lead day-to-day operations of the agency.

JCOPE currently has approximately 55 employees, including attorneys, investigators, auditors, filing specialists, and administrative staff. The agency and its staff are organized into five divisions consistent with its statutory and administrative functions in order to maximize productivity and efficiency. Each division is overseen by a director and each unit has one or more deputy directors.

1. The Ethics Division is divided into two units: Guidance and Financial Disclosure. The Guidance Unit manages the advisory function, providing advice to the State officers and employees who seek guidance in complying with the ethics laws. This function includes providing daily guidance to the regulatory community through an “attorney-of-the-day” program, drafting regulations and guidelines to clarify ethics issues, and developing educational material on the ethics laws. The Financial Disclosure Statement Unit administers and seeks compliance with the financial disclosure program under Public Officers Law § 73-a, which ensures transparency by providing the public with information about the outside financial interests of public officials and employees;
2. The Lobbying Division consists of two units: Statutory Filings and Guidance. The Statutory Filings Unit administers and seeks compliance with the disclosure requirements of the Lobbying Act. The Guidance

Unit provides daily guidance in the form of Advisory Opinions, informal advice, regulations, instructions, and educational materials to assist the regulated community in understanding its obligations and the public in accessing information about the entities that are attempting to influence government decisions;

3. The Investigations and Enforcement Division handles the intake and review of complaints alleging violations of the Public Officers Law, Lobbying Act and Little Hatch Act, conducts substantial basis investigations commenced by a vote of the commissioners, and, when necessary, represents JCOPE before an independent hearing officer adjudicating appropriate penalties for violations of law;
4. The Communications and Public Information Division oversees JCOPE's external communications, the release of public information, content on JCOPE's website, requests for public records, and public meetings; and,
5. The Administration Division manages JCOPE's day-to-day administrative needs, including office management, financial transactions, and personnel matters.

Two units are shared between the Ethics and Lobbying Divisions: the Education Unit and the Compliance Audit and Review Unit. The Education Unit develops and presents the mandatory ethics training programs for State officials and lobbyists as well as other curriculum designed to provide specific guidance on additional topics. The Compliance Audit and Review Unit conducts the statutory random audit program to ensure compliance with the Lobbying Act and establishes and conducts reviews of the financial disclosure statements filed with JCOPE.

## **INVESTIGATIONS AND ENFORCEMENT**

### **A. Introduction**

The Investigations and Enforcement Division handles the intake and review of complaints alleging violations of the ethics and lobbying laws, conducts substantial basis investigations commenced by JCOPE, and represents JCOPE before an independent hearing officer adjudicating alleged violations and appropriate penalties. JCOPE has jurisdiction to investigate violations of these laws by officers and employees of State agencies and departments including commissions, boards, State public benefit corporations, public authorities, State University of New York, City University of New York, and the statutory closely affiliated corporations; the four statewide elected officials and members of the Legislature (and candidates for those offices); employees of the Legislature; certain political party chairpersons; and lobbyists and their clients.

Investigations may be conducted on JCOPE's own initiative, based on referrals from other governmental entities including the State and other inspectors general, or in response to information provided by the public.

### **B. Procedure**

Pursuant to Executive Law § 94, before commencing an investigation, JCOPE must provide the person or entity subject to its jurisdiction into whom it may be inquiring, with notice of any alleged violation of law and a fifteen-day period in which to respond to such allegations. This notice is commonly referred to as a "fifteen-day letter." The fifteen-day letter must describe the possible or alleged violations and include a "description of the . . . evidence, if

any, supporting such allegations, provided however that [the Commission] shall redact any information that might, in the judgment of the [C]ommission, be prejudicial to either the complainant or the investigation. . . .”<sup>67</sup> JCOPE must then vote on whether to commence a full investigation to determine whether a substantial basis exists to conclude that a violation of law has occurred.<sup>68</sup>

After conducting an investigation, JCOPE will issue a “Notice of Substantial Investigation and Hearing.” This notice will include, among other things, not only the notice of hearing and right to be heard, but the factual basis for the allegations. In addition, at least seven days before a hearing, JCOPE will provide the respondent with any additional evidence supporting the allegations that was not set forth in the fifteen-day letter in sufficient detail to enable the respondent to respond.<sup>69</sup> Upon issuing a “Notice of Substantial Investigation and Hearing,” every respondent is entitled to a confidential hearing before an independent hearing officer.<sup>70</sup>

JCOPE has regulations governing the conduct of adjudicatory proceedings relating to the assessment of civil penalties.<sup>71</sup> To ensure fairness of the proceedings, adjudications are conducted by independent hearing officers selected randomly from a pool of hearing officers.

The hearing officer will recommend proposed findings of fact and conclusions of law to the JCOPE Commissioners. The parties have the right to respond to the hearing officer’s recommendations within thirty days of its issuance. In addition, staff must submit a proposed Substantial Basis Investigation Report to the JCOPE Commissioners for a final vote within sixty days of receiving the hearing officer’s recommendations. The JCOPE Commissioners have final authority to adopt either in whole or in part, remand, or dismiss the hearing officer’s recommendations. If the Commission finds a substantial basis to conclude that a violation has occurred, it issues a Substantial Basis Investigation Report which generally becomes public within forty-five days.

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67 N.Y. Exec. Law § 94.

68 *Id.*

69 *Id.*

70 *Id.*

71 19 NYCRR Part 94l. These regulations also cover appeals taken from hearing officer final decisions, and appeals of denials of requests to delete or exempt certain information from a financial disclosure statement.

JCOPE has jurisdiction to enforce penalties for violations of the Public Officers Law and Lobbying Act by executive branch officers and employees, lobbyists, and clients. However, in the event that JCOPE finds a substantial basis to conclude that such violation has occurred by members of, candidates for, or employees of the Legislature, it presents its Substantial Basis Investigation Report to the Legislative Ethics Commission (“LEC”), which may then assess penalties pursuant to its own statutory authority and adjudicatory regulations.

### **C. Guidance Letters**

Not all investigative matters warrant enforcement action. In some cases, based on the facts, JCOPE has concluded that the public interest would be better served by providing education and guidance to prevent future violations. JCOPE continues to exercise its discretion to resolve some investigative matters with confidential “guidance letters” setting forth the appropriate legal and regulatory considerations to guide future conduct.

### **D. Enforcement Partners**

JCOPE maintains relationships with and partners with law enforcement as well as agencies, agency counsel, ethics officers, and other agency personnel, coordinating efforts when appropriate. JCOPE also collaborates with State agencies to efficiently resolve disciplinary matters that involve violations under its jurisdiction. JCOPE’s enabling statutes allow it to refer matters for criminal prosecution.<sup>72</sup> JCOPE has referred matters to various prosecutors’ offices and other enforcement agencies. One referral to the New York State Office of the Attorney General resulted in a former State official’s guilty plea to three counts of Official Misconduct in violation of Penal Law §195.00(1) and requiring the former official to pay over \$250,000 in restitution and fines.<sup>73</sup>

### **E. Enforcement Actions**

The majority of JCOPE’s enforcement actions involve violations of the Code of Ethics and, in particular, relate to violations of the conflict of interest

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<sup>72</sup> N.Y. Exec. Law § 94.

<sup>73</sup> See New York State Office of the Attorney General Press Release, AG Underwood announces guilty plea of former SUNY Upstate Medical University President, <https://ag.ny.gov/press-release/ag-underwood-announces-guilty-plea-former-suny-upstate-medical-university-president> (Sep. 24, 2018)

provision in Public Officers Law § 74(3)(d).<sup>74</sup> Other common violations involve nepotism, gifts, misuse of State resources for outside activities, and lobbyist/client failure to file required lobbying filings. Before the Executive Law was amended in 2016 to make all hearings confidential, JCOPE conducted five public hearings, four involving lobbyist failure to file matters and one involving gift and conflict of interest violations. Information concerning JCOPE's enforcement actions, including its settlement agreements, is published on JCOPE's website.

On February 12, 2013, JCOPE issued its first Substantial Basis Investigation Report against a sitting elected official, Assembly member Vito Lopez, for violating Public Officers Law §§ 74(3)(d), (f), and (h).<sup>75</sup> JCOPE found that Lopez knowingly and intentionally engaged in the following conduct: (1) taking numerous inappropriate actions with respect to, and making offensive comments of a sexual nature to, certain legislative staff members under his supervision; (2) subjecting certain female legislative staff members under his supervision to unwanted physical contact; (3) using or attempting to use his official position to secure unwarranted privileges, including but not limited to, offering raises, promotions, and bonuses as incentives, and threats of adverse employment action, to comply with inappropriate requests made by Lopez; and, (4) misappropriating legislative time and resources with respect to the foregoing inappropriate conduct, including but not limited to, requiring a legislative employee to travel with him to Atlantic City when there was no legitimate governmental purpose. After JCOPE issued its report, Lopez resigned from the Assembly. As a result of JCOPE's investigation and report, the Legislative Ethics Commission assessed a civil penalty in the amount of \$330,000.

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74 See *In re Hoover*, Case No. 16-123, New York State Joint Commission on Public Ethics Enforcement Actions (Nov. 17, 2016) (Thomas Hoover, the Chairperson of the New York State Athletic Commission, admitted that he used his official position to obtain benefits for others including providing official credentials to his son and son's friend to attend boxing matches for free. He settled with JCOPE and agreed to pay a \$2,000 fine for a violation of the Public Officers Law § 74(3)(d).; see also *In re Do*, Case No. 15-064, New York State Joint Commission on Public Ethics (Oct. 28, 2015) (Theresa Do, employee of the State of New York Mortgage Agency, a division of New York State Homes & Community Renewal, admitted to drafting and delivering letters on official State agency letterhead regarding personal matters, two of which were attempts to financially benefit herself and others. Do agreed to pay \$1,500 for a violation of Public Officers Law § 74(3)(d)).

75 See *In re Lopez*, Case No. 127, New York State Joint Commission on Public Ethics Enforcement Actions (Feb. 12, 2013).



Following its investigation into Lopez, JCOPE found that former Assembly member Dennis Gabryszak violated Public Officers Law §§ 74(3)(d), (f), and (h), by knowingly and intentionally engaging in the following conduct involving at least seven female staff members: (1) subjecting certain female staffers under his supervision to numerous inappropriate and offensive comments of a sexual nature, offensive videos and photographs, and inappropriate physical contact; (2) using or attempting to use his official position to secure unwarranted privileges, including, but not limited to, offering raises and issuing threats of adverse employment action to force compliance with inappropriate requests made by Gabryszak; and, (3) misappropriating legislative time and resources related to such conduct. In addition, Gabryszak misappropriated State resources, including, but not limited to, the use of staff, printers, office phones, and mailing labels from his district office for his Assembly campaign.<sup>76</sup> The LEC assessed a civil penalty in the amount of \$100,000 against Gabryszak, who resigned from the Assembly before JCOPE's enforcement action concluded.

In February 2019, JCOPE and the LEC entered into a settlement agreement with former Senator Marc Panepinto stemming from JCOPE's investigation into allegations that Panepinto made unwanted sexual advances toward a staff member and attempting to obstruct JCOPE's ensuing investigation. The LEC referred the matter to JCOPE after it was provided with an internal investigation report by the State Senate following the staffer's resignation from Panepinto's office. Upon receiving the matter, JCOPE began investigating Panepinto and then collaborated with the Erie County District Attorney's Office and United State Attorney's Office in the matter. On June 28, 2018, Panepinto pled guilty in federal court in the Western District of New York to a violation of Title 18 of the United States Code, Section 600, "Promise of Employment, Compensation, or other Benefit for Political Activity," a misdemeanor offense. He was sentenced to a two-month prison sentence, one year of supervised release, and a \$9,500 fine. In the settlement with JCOPE, Panepinto agreed to pay a \$10,000 fine and admitted to violating POL §§ 74(3)(d) and (h).<sup>77</sup>

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76 See *In re Gabryszak*, Case No. 13-168, New York State Joint Commission on Public Ethics Enforcement Actions (Dec. 31, 2015).

77 See *In re Panepinto*, Case No. 16-038, New York State Joint Commission on Public Ethics Enforcement Actions (Feb. 5, 2019); *see also*, *In re Savage*, Case No. 17-079, New York State Joint Commission on Public Ethics Enforcement Actions (Jul. 29, 2019).

With respect to lobbying matters, JCOPE entered into settlement agreements with two lobbying organizations and individual lobbyists over alleged Lobbying Act violations related to donations made by them to the Campaign for One New York (“CONY”). CONY was a not-for-profit corporation formed in late 2013 by three former campaign workers for City of New York Mayor Bill De Blasio (“the Mayor”) from which the Mayor sought and obtained support for his legislative and policy objectives. These settlements arose out of an investigation opened in 2015 in which the Commission learned of lobbyists and clients of lobbyists who donated to CONY at the request of either the Mayor or his campaign treasurer while actively lobbying officials of the City of New York, including the Mayor. Following the March 2017 announcement by the Acting United States Attorney for the Southern District of New York that it had completed its investigation into fundraising by and on behalf of the Mayor (including CONY’s activities) and would not be filing criminal charges, the Commission resumed investigating these matters under its mandate to regulate the activities of lobbyists and their clients in New York State.

Lobbyist James F. Capalino, individually and on behalf of his business, James F. Capalino and Associates, Inc., agreed to pay \$40,000 to settle the Commission’s investigation into allegations of Lobbying Act violations. Capalino admitted that in or about April 2015, Mayor Bill de Blasio directly solicited his support of the work of CONY and advised Capalino that then-CONY treasurer Ross Offinger would contact him. In May 2015, Capalino contributed \$10,000 to CONY and obtained another \$90,000 in contributions to CONY from nine of his lobbying clients. Soon after, Capalino worked with Offinger to arrange a meeting among those clients, Capalino, and the Mayor that took place in September 2015. Capalino was retained by those clients to lobby the City of New York, the Mayor, and his senior staff.<sup>78</sup>

In the second settlement, New Yorkers for Clean, Livable, and Safe Streets (“NYCLASS”), its co-founder and president Steven Nislick, and board member Wendy Neu, settled allegations that they had violated the Lobbying Act. NYCLASS, Nislick, and Neu admitted that while they were engaged in lobbying New York City officials and the Mayor on issues related to the horse

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78 See *In re Capalino and Associates*, Case No. 16-090, New York State Joint Commission on Public Ethics Enforcement Actions (Mar. 30, 2018).

carriage industry and replacing those carriages with electric-powered vehicles, Neu donated \$25,000 to CONY, and both she and Nislick each later donated \$50,000 to CONY. NYCLASS admitted it failed to register as a lobbyist, and as part of the settlement will file the appropriate documents. NYCLASS agreed to pay \$10,000 to settle the Commission's inquiry into allegations.<sup>79</sup>

## **F. Complaint Information**

JCOPE's procedures for submitting tips and filing complaints alleging violations of the Public Officers Law or the Lobbying Act are available on JCOPE's website at [www.jcope.ny.gov](http://www.jcope.ny.gov) and [www.reportmisconduct.ny.gov](http://www.reportmisconduct.ny.gov) or by calling JCOPE's hotline at 800-87-ETHICS (1-800-873-8442) and pressing '4' when prompted.

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79 See *In re NYCLASS, Nislick, and Neu*, Case No. 17-088, New York State Joint Commission on Public Ethics Enforcement Actions (Apr. 5, 2018).

## GENERALLY: CONFLICTS OF INTEREST AND REGULATED CONDUCT

### A. Conflicts of Interest

A fundamental rule of public ethics is that no officer or employee of a State agency, member of the Legislature, or legislative employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his or her duties in the public interest. In analyzing potential conflicts, JCOPE has relied on the concept enunciated in a 1979 Attorney General Opinion that states “*a public official must not only be innocent of any wrongdoing, but he must be alert at all times so that his acts and conduct give the public no cause for suspicion. He must give no appearance of a potential conflict between his official duties and personal activities even though an actual conflict is not present.*”<sup>80</sup>

State officers and employees must always put the public interest ahead of their own. Section 73 of the Public Officers Law identifies, regulates, and in some cases bars, certain types of business and professional activities in which State officers and employees may wish to engage outside of their official State duties.<sup>81</sup> The Code of Ethics, set forth in Public Officers Law § 74, establishes general principles intended to guide the conduct of State officers and employees. It not only bars actual conflicts of interest, but, also, under some circumstances,

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80 Op. Att’y. Gen. 66 (1979).

81 These limitations do not apply to certain unpaid State officers as set forth in Public Officers Law § 73(1)(i)(iii).

conflicts that appear to raise questions about a public official's integrity. Thus, Public Officers Law § 74 applies to conduct that is not expressly prohibited by Public Officers Law § 73.

JCOPE and its predecessors have addressed the challenges that State employees face in complying with Public Officers Law § 73 and the Code of Ethics, while engaging in other business that may relate to their State duties. Distinct issues arising out of engaging in outside activities will be discussed in the next chapter. The following categories are common applications of Public Officers Law to areas of potential conflicts.

## **B. Business With or Against the State**

### ***1. Business Against State Interest***

Public Officers Law § 73(3)(a) prohibits the statewide elected officials, full-time State officers and employees, and members and employees of the Legislature from appearing or practicing before the New York Court of Claims against the interest of the state.<sup>82</sup> All other State officers and employees who are required to file an annual financial disclosure statement are prohibited from appearing or practicing before the Court of Claims against the interest of their employing agency.<sup>83</sup> The application of Public Officers Law § 73(3) is addressed in Advisory Opinion No. 93-17, when a member of a State board asked whether he or his firm could represent clients in litigation in the Court of Claims where his State agency was a party. It was found, in part, that pursuant to Public Officers Law § 73(3)(b), the State board member may not represent clients in litigation before the Court of Claims when the interests of the client conflict with those of his State agency. However, this prohibition did not apply to other associates in the board member's private law firm as long as the member did not share in the net revenues earned from the matter.<sup>84</sup>

### ***2. Contracting with the State***

Public Officers Law § 73(4)(a) prohibits State employees from contracting with any State agency for the sale of goods and services worth more than \$25, *unless* the contract is awarded after public notice and competitive bidding. A

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82 N.Y. Pub. Off. Law § 73(3)(a).

83 N.Y. Pub Off. Law § 73(3)(b).

84 See New York State Ethics Comm'n, Advisory Op. No. 93-17 (1993); see also N.Y. Pub. Off. Law § 73(10).

similar prohibition applies to certain county political party chairmen. Advisory Opinion No. 92-02 considered the implications of the Public Officers Law when a State employee renders several types of services to his own State agency. The State employee inquired whether he, or the corporation of which he owned forty percent, could (1) provide training seminars to State agencies; (2) include State agency employees in its seminar audiences; and (3) respond to consulting contract requests by State agencies. It was held, in part, that it was not a violation of Public Officers Law § 73(4)(a) for the State employee or the corporation to respond to requests for bids or proposals issued by any State agency and, if awarded the contract, to provide services to any State agency, including the State employee's own agency, as long as the contract was awarded through a competitive bidding process.<sup>85</sup> However, the State employee could *not* be compensated in any way for his appearance in support of the bid on the contract.<sup>86</sup> A spouse of a State employee may also bid for a State contract as long as the contract is awarded after public notice and competitive bidding and the State employee has no involvement with the contract or the bid criteria.<sup>87</sup>

An example of what constitutes "goods or services" can be found in Advisory Opinion No. 91-11. The New York State Office for People with Developmental Disabilities was considering implementing a program under which its employees could become certified as family care providers and enter into contracts with the agency to care for agency clients in the employees' homes. In addition to the regular reimbursement provided to all family care providers, agency employees who acted as family care providers would receive a significant stipend that was not provided to family care providers who were not employed by the agency. It was determined that the stipend would violate Public Officers Law § 73(4)(a) because receipt of a stipend in exchange for use of one's home as a family care provider home constitutes "selling goods or services" to one's State agency without public notice and competitive bidding.<sup>88</sup>

These standards were similarly applied in Advisory Opinion No. 91-15, where an employee of the State Division of Family and Youth (DFY) and his spouse served as certified foster parents for children placed in DFY custody. No violation of Public Officers Law § 73(4)(a) was found because they did not

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85 See New York State Ethics Comm'n, Advisory Op. No. 92-02 (1992).

86 See N.Y. Pub. Off. Law §§ 73(4), 73(7).

87 New York State Ethics Comm'n, Advisory Op. No. 95-30 (1995).

88 New York State Ethics Comm'n, Advisory Op. No. 91-11 (1991).

receive a stipend or salary other than reimbursement for their service and expenses which are given equally to State and non-State employees.<sup>89,90</sup>

### ***3. Representation Before the State and Prohibited Communication***

Public Officers Law §§ 73(7) and (12) limit when a State employee may appear or render services by himself, herself, or another, in connection with a matter before the State. Public Officers Law § 73(7) prohibits a State officer or employee from receiving compensation, directly or indirectly, for appearing or providing services before any State agency in connection with (i) the purchase, sale, rental or lease of real property, goods or services, or a contract therefor, from, to or with any such agency; (ii) any proceeding relating to rate making; (iii) the adoption or repeal of any rule or regulation having the force and effect of law; (iv) the obtaining of grants of moneys or loans; (v) licensing; or (vi) any proceeding relating to a franchise provided for in the Public Service Law. A similar prohibition applies to certain county political party chairperson.<sup>91</sup> Section 73(12) prohibits a State employee from orally communicating with a State agency, with or without compensation, about the merits of a matter of a type listed in Section § 73(7). This restriction applies only when an employee is representing a private entity that is appearing or rendering services in connection with a matter before a State agency. In addition, there are restrictions on State officers and employees receiving compensation for rendering services in connection with proposed or pending legislation in the Legislature.<sup>92</sup>

Note that, under these provisions, a State employee *may* be allowed to submit an application to a State agency as long as the employee does not receive compensation for doing so, but Public Officers Law § 73(12) prohibits that employee from orally communicating with agency employees about the application when acting as a member of a private firm or association or a stockholder in a corporation which is appearing before the agency in connection with the application.<sup>93</sup>

89 New York State Ethics Comm'n, Advisory Op. No. 91-15 (1991). The Opinion noted, however, that Public Officers Law § 74 would prohibit DFY employees who were (1) designated "policymakers"; (2) involved in the certification process; or (3) involved in administering the foster care program, from serving as foster care parents for children in DFY custody.

90 *Id.*

91 N.Y. Pub. Off. Law § 73(7)(b).

92 N.Y. Pub. Off. Law § 73(7-a).

93 New York State Ethics Comm'n, Advisory Op. No. 95-43 (1995); see also, Outside Activities chapter, sec. B(2) relating to paid positions with not-for-profits which also can implicate POL § 73(7).

#### ***4. An Affiliated Entity's Ability to Do Business with the State***

When a State officer or employee is precluded from engaging in business with the State, the private firm, association, or corporation with which the State employee is affiliated may still contract with the State, if it complies with certain conditions, such as ensuring that the State employee does not share in the net revenues generated as a result of the State business.<sup>94</sup>

#### ***5. Family Matters***

The Code of Ethics implicates a State employee's personal transactions as well as familial matters.<sup>95</sup> For example, Advisory Opinion No. 91-14 held that a State employee whose job duties included conducting field inspections and investigations of automotive facilities was prohibited from taking his personal car, or that of a family member, to an automotive facility that he had inspected on behalf of the State. The reasoning is that the State employee had influence over the licensing, certification, and inspection of the repair facility and, therefore his actions could lead to the imposition of fines or the closing of the facility.<sup>96</sup> In this case, the scope of the conflict of interest captured a matter affecting family members of State employees as well.

However, when it comes to assisting family members, there are some matters involving the State where there is no conflict of interest. Advisory Opinion No. 95-43 found that a non-policymaking State employee could assist his family with a permit application submitted to the State employee's agency so long as the application was made in the employee's own name and the employee recused himself from playing any role in considering the application. In doing so, the State employee may orally communicate with State agency officials on his own behalf or on behalf of his family.<sup>97</sup>

Similarly, Advisory Opinion No. 94-22 found that a State employee was allowed to recommend a vendor to his agency where the president of the vendor was the former brother-in-law of the State employee, provided that (1) the relationship is disclosed; (2) the State employee has no interest, financial or otherwise, in the vendor and will not be compensated by the vendor for services rendered under the contract with the agency; (3) the employee does not utilize

94 N.Y. Public Off. Law § 73(10).

95 See *supra* note 82.

96 See New York State Ethics Comm'n, Advisory Op. No. 91-14 (1991).

97 See New York State Ethics Comm'n, Advisory Op. No. 95-43.



the vendor's services; and (4) the agency takes steps to insure that the selection of the vendor is based on the merits. Here, it was also noted that the State employee was not motivated by personal interest, financial or otherwise, and had not used his position to secure a contract for the vendor.<sup>98</sup>

Advisory Opinion No. 95-39 evaluated whether a State employee could be involved in a grievance arbitration proceeding involving a State facility where her husband served in a senior-level capacity, and could be named as a party or potential witness to the actions giving rise to the grievance matter. The advisory opinion distinguished between the State employee's role in representing the State in a disciplinary arbitration and her role in reviewing a grievance. Since the State employee's role in arbitration was to be adversarial in representing the interests of the facility, the State employee could participate in such proceedings. However, where the employee served as a reviewer of a contract or disciplinary grievance, the State employee was required to be objective; she would be reviewing the actions of a facility where her husband may have played a role in the circumstances leading to a grievance or had an impact on the resolution of the grievance. In this role, there was the perception that the State employee "cannot fairly sit in review of her husband's actions or the actions of management at a facility where her husband can be influential in the actions management takes."<sup>99</sup> Therefore, the employee must recuse herself in such circumstances.

The Code of Ethics may even impact contact between a State employee's agency and his or her spouse. Advisory Opinion No. 95-35 addressed the application of Public Officers Law § 74 to a State employee whose husband's clients had contacted the department over which the State employee had oversight. It was determined that contact between the State employee's agency and her spouse was allowed, but with some limitations. The State employee would be required to (1) disclose the spousal relationship; (2) recuse herself from any matter involving her husband's clients; (3) not reveal confidential information to her husband; and (4) not have any financial interest in his practice beyond that created by the spousal relationship. Even though the relationship between the State agency and the spouse of the State employee was indirect, (i.e., the client of the spouse had direct contact with the agency),<sup>100</sup> the

98 See New York State Ethics Comm'n, Advisory Op. No. 94-22 (1994).

99 New York State Ethics Comm'n, Advisory Op. No. 95-39 (1995).

100 *But cf.* New York State Ethics Comm'n, Advisory Op. No. 91-21 (1991).

State employee had sufficient interest to create an appearance that she could benefit from the work of her husband.<sup>101</sup>

### **C. Former Business Relationships (Reverse Two-Year Bar)**

The “reverse two-year bar” was developed in Advisory Opinion No. 94-11 to address potential conflicts of interest (or the appearance of such conflicts) when a person enters State service from the private sector. The rules are not prescribed by statute. The advisory opinion noted that prior employment or past business relationships may affect a person’s judgment in his State position and at least raise questions as to:

- whether the employee would use his official position to “secure unwarranted privileges or exemptions” for the former employer or business entity [in violation of § 74(3)(d)];
- whether by discussing and voting on an application affecting a former employer or business entity the employee would give “reasonable basis for the impression” that he can be improperly influenced, that others may “enjoy his favor in the performance of his official duties” or that he is affected by the “kinship, rank, position or influence of any party or person” [in violation of § 74(3)(f)]; and
- whether by discussing and voting on an application affecting a former employer or business entity, the employee would raise suspicion among the public that he is engaged in acts in violation of his trust [in violation of § 74(3)(h)].<sup>102</sup>

Advisory Opinion No. 94-11 considered an inquiry from an unpaid, policymaking member of a State board who sought guidance on avoiding conflicts of interest or the appearance of conflicts with respect to the member’s private sector activities. Since there was no statutory basis for an absolute prohibition on State board members acting on matters involving former employers or those with whom they had business relationships, the advisory opinion adopted a rebuttable presumption that a member of a board must be recused from involvement in a matter that concerns a former

101 See New York State Ethics Comm’n, Advisory Op. No. 95-35 (1995).

102 See New York State Ethics Comm’n, Advisory Op. No. 94-11 (1994).

employer or business that he or she left within the last two years.<sup>103</sup> The presumption requiring recusal could be rebutted by looking at certain factors, including but not limited to:

- whether the board member was in an employment relationship with the applicant, which implies daily oversight and control, or was in a consulting relationship, which suggests a more temporary connection;
- whether the board member was an officer or senior official of the applicant;
- whether the board member or the applicant had a fiduciary relationship with the other;
- whether the applicant is the actual former employer or business entity with which the board member had the relationship or whether it is a related, subsidiary, or umbrella organization; and
- how long the relationship existed.

There is no corresponding presumption of required recusal with respect to full-time employees (as opposed to the unpaid board member at issue in Advisory Opinion No. 94-11).<sup>104</sup> Instead, when a matter arises concerning a former employer or business that the State employee left within the prior two years, the employee is required to consider whether recusal is necessary. A slightly different set of factors to consider include:

- the nature of the prior relationship;
- the effect that resolution of the matter would have upon the financial interest of the person involved in the relationship;
- the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- the sensitivity of the matter;
- the difficulty of reassigning the matter to another employee; and

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<sup>103</sup> A two-year time period was used because the Legislature had determined, in the context of the two-year bar, that two years is a period when judgments may be subject to question.

<sup>104</sup> New York State Ethics Comm'n, Advisory Op. No. 98-09 (1998).

- adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

This conclusion also left open the possibility that where some potential for conflict exists, close supervision by a supervisor of the affected employee's work would reduce the appearance that the employee might act inappropriately to favor his or her past employer or business associates, and thus mitigate the need for recusal.<sup>105</sup>

#### **D. Interested Board Members**

Some State boards and authorities are required by statute to have members who represent certain special interest groups, professions, geographic regions, or satisfy other criteria. As with any State board, there is a recognized public interest in having experienced individuals from the private sector participate and share their expertise.<sup>106</sup> However, as with the reverse two-year bar, "[t]here is a tension between the need to prevent conflicts of interest or their appearance . . . and the State's need for the service of skilled and talented [individuals] recruited from the private sector."<sup>107</sup>

The New York State Ethics Commission addressed this tension in Advisory Opinion 95-13, which involved the New York State Thoroughbred Breeding and Development Fund (the "Fund"). The Fund receives a percentage of pari-mutuel handle and breakage and distributes the money it receives as awards and premiums. In 1994, the composition of the board was amended by statute to allow individuals with a private interest in thoroughbred breeding and racing to serve on the Fund's board. A question was raised as to whether the individual board members with such interests needed to recuse from decisions about distributing the money the Fund collects and determinations about qualifications to receive awards, because board members involved in breeding and racing could be beneficiaries of awards, and thus arguably have a personal interest in the board's resolutions in these matters. The Ethics Commission took notice of the recent legislative amendments and was guided by the

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<sup>105</sup> *Id.*

<sup>106</sup> *See id.*

<sup>107</sup> *Id.*

principle of statutory construction that favors avoiding construing a statute in such a way as to render it ineffective. Likewise, the Ethics Commission considered that when dealing with irreconcilable provisions of statutes, an effort should be made to read them compatibly to preserve legislative intent.<sup>108</sup>

In that vein, the Ethics Commission concluded that board members “must recuse themselves from deliberating and voting on any matter from which they may directly and personally benefit due to their activities as owners or breeders, but they may fully participate in other matters.”<sup>109</sup> Applying this principal to specific determinations pending before the Fund, the Ethics Commission concluded that board members could vote on resolutions dealing with the general allocation of funds, reasoning that the potential to benefit from a decision as a member of a category or class was too speculative to create a conflict of interest. The Ethics Commission held that recusal was required “only when a decision would directly and personally benefit a particular owner or breeder.”<sup>110</sup>

Thus, potentially interested board members who have expertise or experience in the private sector can participate in matters in which they have an indirect or general interest as a member of a category, but they must recuse on matters in which their interest is directly and personally at issue.

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108 See New York State Ethics Comm’n, Advisory Op. No. 95-13.

109 *Id.*

110 *Id.*

## OUTSIDE ACTIVITIES

### A. General Provisions

The regulations governing outside activities and political activities are in Part 932 of Title 19 of the New York Codes, Rules and Regulations. The regulations effectuate the Public Officers Law conflict of interest provisions and provide an outside activity approval procedure for policymakers,<sup>111</sup> heads of State agencies, and statewide elected officials.<sup>112</sup> The regulations also address restrictions on certain political activities.<sup>113</sup>

Pursuant to Part 932, while in State service, policymakers (other than unpaid and per diem officers and employees), and the heads of a State agency or a statewide elected official (i.e., the Governor, Lieutenant Governor, Attorney General, and the Comptroller), are required to obtain certain approvals, based on expected compensation, before seeking or accepting any other employment or compensation for professional services. If annual compensation generated, or expected to be generated, is between \$1,000 and \$5,000, then agency approval is required; if annual compensation will be more than \$5,000, then both agency and JCOPE approval is required.<sup>114</sup> Regardless of compensation, agency and JCOPE approval are required if the outside

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111 A policymaker is any officer, employee, director, commissioner, or member of a State agency (other than a multi-state authority) who has been determined to hold a policymaking position by his or her agency. *See* 19 NYCRR 932.2(g).

112 19 NYCRR 932.1.

113 *See infra* Section B.4.

114 The outside activity approval form to be submitted to JCOPE can be found at <https://jcope.ny.gov/sites/g/files/ocf746/files/documents/2017/10/2017-outside-activity-approval-formwriteable-62817.pdf>.

activity is holding an elected or appointed public office, or serving as a director or officer of a for-profit entity. Each State agency may impose more restrictions than JCOPE's regulations.

In addition to the required approvals, any individual subject to the Code of Ethics should be mindful that he or she is prohibited from engaging in any outside activity that interferes or substantially conflicts with the proper and effective discharge of his or her State duties or responsibilities.<sup>115</sup> To this end, actions associated with outside activities are not permitted during State work hours and should not interfere with State work responsibilities.<sup>116</sup> No State resources of any type may be used to accomplish an employee's outside activity, including telephones, office supplies, postage, copiers, computers, and support staff assistance.<sup>117</sup> When an employee's outside activities interfere, or appear to interfere, with the employee's primary State position because they are so substantial or demanding of his or her time and attention, he or she may be rendered less effective and thus have a conflict of commitment. Whether there would be such a conflict of commitment is a determination that is left to the employee's supervisor or appointing authority.<sup>118</sup> The circumstances involving a conflict of commitment could violate the Code of Ethics, especially if there is a failure to follow the rules regarding time and attendance and the use of State resources for an outside activity.

More generally, the Code of Ethics prohibits a State employee from engaging in an activity that raises even an appearance of a conflict of interest with respect

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115 19 NYCRR 932.3.

116 *See In re Oladipo*, Case No. 18-110, New York State Joint Commission on Public Ethics Enforcement Actions (Feb. 7, 2019) (JCOPE settled with a professor at York College, part of the City University of New York, who had asked his subordinates to participate in a conference hosted by his outside organization, and then approved his subordinates' reimbursement requests in relation to that conference. The professor had also failed to disclose his position with the organization as well as the compensation he received from this outside activity on his Financial Disclosure Statements for several years; he agreed to pay a fine of \$6,000 for violating the POL).

117 *See In re Baalbaki*, Case No. 13-152, New York State Joint Commission on Public Ethics Enforcement Actions (Mar. 13, 2014) (JCOPE entered into a settlement with a former Metropolitan Transportation Authority Assistant Chief Officer of Infrastructure Engineering who agreed to pay \$1,500 for improperly using agency resources and equipment, including scanners, printers, computers and technical software, to benefit his private engineering company); *see also In re Tyson*, Case No. 16-024, New York State Joint Commission on Public Ethics Enforcement Actions (Oct. 27, 2016) (JCOPE settled with a former Metropolitan Transportation Authority Senior Director in Capital Programs Management who paid a \$4,000 fine for using State personnel, resources and equipment, including email, phones, computers, and printers for non-State business, during work hours to engage in various unauthorized outside activities).

118 *See New York State Ethics Comm'n*, Advisory Op. No. 92-08 (1992).

to his or her State duties; a violation of the law may occur in the absence of an actual conflict.<sup>119</sup> For example, Advisory Opinion No. 91-07 prohibited the president of a State University of New York campus from serving as a director of a bank in which the college deposited funds or had an ongoing business relationship because such relationship would raise an appearance of a conflict of interest.<sup>120</sup> In certain circumstances, however, where the potential arises for a conflict between State duties and an outside activity, recusal can be an appropriate remedy.<sup>121</sup>

## B. Specific Situations

### 1. *Private Practice of Law and Expert Testimony*

Public Officers Law §§ 73 and 74 do not prohibit individuals from engaging in the private practice of law or serving as an expert witness as an outside activity, but such individuals should be mindful of certain limitations. For example, Advisory Opinion No. 99-12 did not prohibit a State commissioner from engaging in the limited private practice of law, provided the commissioner abided by the requirements of Public Officers Law §§ 73(2), (3), (4), and (7), and the commissioner did not

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119 See, e.g., New York State Ethics Comm'n, Advisory Op. No. 94-07 (1994) ("Even if the policymaker is not in the line of authority to regulate or oversee the provider of services by which the policymaker is employed or has a business relationship, the appearance exists that the individual could influence other policymakers to render decisions favorable to the outside organization. There remains the potential appearance that the provider has retained the policymaker in order to gain influence with the State agency, to obtain unwarranted privileges, to obtain insider or other confidential information, or has provided the outside employment or contract as a reward to ensure that the policymaker will influence licensing or rate setting decisions favorable to the provider.").

120 See New York State Ethics Comm'n, Advisory Op. No. 91-07 (1991) (Campus president, as chief administrative officer, is involved in the bank selection process, and it may not be possible for the campus president (as a bank director) to place the campus's interests above those of the bank in situations where there was a dispute or a disagreement between the two institutions); see also *In re Persaud*, Case 17-060, NYS Joint Commission on Public Ethics Enforcement Actions (Dec. 6, 2017) (JCOPE entered into a settlement with a former Elevator & Escalator Superintendent employed by the Metropolitan Transportation Authority—New York City Transit, who agreed to pay a fine of \$4,000 for continuing to work for an elevator consulting company despite being instructed to discontinue this outside activity).

121 See, e.g., New York State Ethics Comm'n, Advisory Op. No. 06-03 (2006) (where an academic employee of the State University of New York at Buffalo served as the Town Supervisor of a municipality that regularly considers matters involving the university, to comply with the Public Officers Law, the State employee must recuse himself as Town Supervisor from any matters in which the interests of the Town and the university diverge, and the State employee and the university must take steps to insure that neither party conducts itself in such a way as to receive an unfair advantage or unwarranted benefit, or to create the impression that they are in any way affected by the State employee's dual position).



share in the net revenues derived from the work of other attorneys in the law firm engaged in activities in which the commissioner was prohibited from engaging.<sup>122</sup>

However, Advisory Opinion No. 00-01 held that a Public Service Commission commissioner was prohibited from serving as counsel to private parties in Article 78 proceedings involving any State agency, to the extent that such proceedings involved any of the matters specified in Public Officers Law § 73(7)(a), and that Public Officers Law § 74 prohibited the commissioner from representing private parties in Article 78 proceedings against State agencies (and their officers or employees) that were regulated by, or regularly appear before, the Public Service Commission.<sup>123</sup>

With regard to serving as an expert witness, JCOPE has found that Public Officers Law § 74 does not prohibit an employee of the State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities from providing advice and testimony as an expert witness on behalf of parties in specified proceedings, on the condition that he (1) did not provide such services in cases in which the plaintiff has applied, or will apply, for the agency's services; (2) did not disclose or use confidential information obtained by virtue of his State employment; (3) took reasonable steps to clearly indicate that his views as an expert are not the views of the State or any State agency; (4) did not receive compensation for such services against the interest of the State in a case before the Court of Claims; and (5) received his agency's permission to engage in the outside activity and abided by any additional conditions placed on the activity by his agency.<sup>124</sup>

## ***2. Paid Positions with Not-for-Profits***<sup>125</sup>

Advisory Opinion No. 89-02 provided that a State employee, acting as Executive Director of a not-for-profit organization from which he received compensation, could not sign an application on behalf of such organization to

122 See New York State Ethics Comm'n, Advisory Op. No. 99-12 (1999). The net revenues rule is found in N. Y. Pub. Off. Law § 73(10).

123 See New York State Ethics Comm'n, Advisory Op. No. 00-01 (2000). Similarly, New York State Ethics Comm'n, Advisory Op. No. 91-16 (1991), held that Public Officers Law § 74(3)(h) prohibited a Motor Vehicle Violations Bureau referee employed by the Department of Motor Vehicles from engaging in the private practice of traffic law, and that Public Officers Law § 73(7)(a) prohibited the referee from receiving compensation to represent a client at an agency proceeding before another referee in all regions of the State. See New York State Ethics Comm'n, Advisory Op. No. 91-16 (1991).

124 See New York State Ethics Comm'n, Advisory Op. No. 00-03 (2000).

125 See also Conflicts of Interest and Regulated Conduct chapter relating to Business With or Against the State.

obtain a grant from a State agency because such act would constitute an “appearance” within the meaning of Public Officers Law § 73(7)(a).<sup>126</sup> Further, the signing of a certification on behalf of the non-profit organization and the act of approving the grant by the State agency did not fall under the “ministerial matter” exception to the prohibitions in § 73(7).<sup>127</sup>

Advisory Opinion 91-03 provided that Public Officers Law § 73(4)(i) did not prohibit full-time employees of the Office of Mental Retardation and Developmental Disabilities (now Office for People With Developmental Disabilities), from engaging in outside employment for providers that were licensed by and have their rates set by the agency provided that such employees: (1) had not been designated as serving in policymaking positions; (2) were not engaged in duties directly or indirectly related to licensing or rate setting of not-for-profit providers of services; and (3) did not negotiate, authorize or approve such licenses or rates in any way.<sup>128</sup> Public Officers Law § 73(4)(i), however, prohibited all Office for People With Developmental Disabilities employees from selling goods or services to any person or entity licensed by, or whose rates were fixed by, the agency.<sup>129</sup>

### ***3. Fundraising***

Advisory Opinion No. 97-28 provided that Public Officers Law §§ 73(5) and 74 did not prohibit an employee of the Department of Environmental Conservation from engaging in charitable fundraising as an outside activity, provided that he (1) did not solicit from entities or individuals with open pending cases in which he was involved or where there were cases within the last twelve months in which he was involved; (2) recused himself from the matter if an entity or individual from which he has accepted a contribution subsequently has a matter that comes before him within one year of his acceptance of the contribution (although the one year period may vary depending upon the circumstances); and (3) refrained from using his official title, position, or authority in his fundraising efforts, and from soliciting from subordinates in his unit.<sup>130</sup>

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126 See New York State Ethics Comm’n, Advisory Op. No. 89-02 (1989).

127 *Id.*

128 See New York State Ethics Comm’n, Advisory Op. No. 91-03 (1991).

129 *Id.*

130 See New York State Ethics Comm’n, Advisory Op. No. 97-28 (1997).

Similarly, with respect to political fundraising, Advisory Opinion No. 98-12 provided that an employee may not solicit campaign contributions from any individual or business entity which (1) currently had matters before him or before the units he supervised; (2) he had substantial reason to believe would have matters before him or such units in the foreseeable future; or (3) had matters before him or such units in the last twelve months.<sup>131</sup> However, a State employee may participate in mass mailings, even if some of the letters will reach individuals or business entities from which he otherwise could not solicit funds. Further, if an entity properly solicited by him made a contribution and subsequently had a matter before him or a unit he supervised, he would be required to recuse himself if the matter arose within one year of the contribution, although the length of the period could vary depending upon the circumstances.<sup>132</sup> Finally, the employee could not use his official title, position, or authority to fundraise or to solicit from subordinates in his units, nor was he able to use State resources for political purposes, engage in political activities in a State office, or engage in such activities during business hours unless leave was taken.<sup>133</sup>

Later, in Advisory Opinion No. 16-02, JCOPE reconsidered the scope of Advisory Opinion No. 98-12, which had excluded statewide elected officials from its holding. Advisory Opinion No. 16-02 provided that Public Officers Law § 74 applied to statewide elected officials and members of the Legislature when they are engaged in campaign fundraising activities. An elected official running for re-election may not solicit or accept funds from a person or entity that is an active subject of an ongoing exercise of enforcement powers of the elected official or the official's office.

#### ***4. Outside Political Activities (As Candidate, etc.)***<sup>134</sup>

State agency heads, statewide elected officials, and policymakers (regardless of whether the person serves on an unpaid or per diem basis) may not serve as

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131 See New York State Ethics Comm'n, Advisory Op. No. 98-12 (1998).

132 *Id.*

133 *Id.*; See *infra* Section B.4, for more on outside political activities.

134 The federal Hatch Act restricts federal employee participation in certain partisan political activities, the purpose of which is to maintain a federal workforce free from partisan political influence or coercion. See 5 U.S.C. §§ 7321-7326. While the State of New York does not have a direct counterpart to the federal Hatch Act, Civil Service Law § 107 (the "Little Hatch Act") prohibits certain political activity in the workplace.

an officer, director, or board member of any party or political organization or as a member, officer, director, board member, or district leader of any party committee.<sup>135</sup> However, State agency heads, statewide elected officials and policymakers are not prohibited from serving as a delegate to a State or national party convention.<sup>136</sup>

In addition to the prohibitions noted above, Public Officers Law § 74 restricts State employees from participating in certain other aspects of political campaigns. As noted in Advisory Opinion No. 98-12, campaigns must be run on an employee's own time, and an employee's State position should not be used to gain any special advantage. Care must be taken to ensure that political literature and speeches do not indicate, to any degree, that the agency for which the employee works endorses the employee's campaign or positions. Thus, any campaign biography must be restricted to include only the employee's State title and description of his or her State position. A separate entity should be formed for the receipt of campaign contributions.<sup>137</sup>

Situations where a State officer or employee sought election to and service in certain positions, including city council member, school board member, county legislator, and town board member have been addressed. In considering a city council position, Advisory Opinion No. 92-16 provided that Public Officers Law § 74 prohibited a State employee from seeking election to, and serving on, the city council of a municipality in the geographic area in which he worked where the State employee's responsibilities entailed leasing property from his agency to entities that may have included that municipality. Given a city council member's broad scope of responsibilities, there would be significant matters before the city council that could create a conflict of interest between the State employee's city council and State responsibilities. Recusal was not a viable option given that the State employee would be required to repeatedly recuse himself from matters coming before the city council. Given the nature of the State employee's responsibilities and the responsibilities and powers of the city council, a campaign for a city council seat would create, at the least,

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135 See 19 NYCRR 932.4(a)-(b); see also New York State Ethics Comm'n, Advisory Op. No. 04-03 (2004) (State policymaker could not serve as a member of the board of a local partisan political club where the club and board service were equivalent to being an officer in a political party or political organization).

136 See 19 NYCRR 932.4(c).

137 See *supra* Section B.3, for more on political fundraising.

an appearance of a conflict of interest in violation of the standards of Public Officers Law § 74.<sup>138</sup>

In contrast, in considering a school board position, Public Officers Law § 74 did not prohibit a State employee from seeking election to, and serving on, a school board in the geographic area in which he worked where the State employee's responsibilities entailed the leasing of property for his agency.<sup>139</sup> The employee's State duties were not so intertwined with the public he served and the duties he would perform as a school board member as to prohibit school board service, and recusal was an effective and appropriate remedy. With respect to seeking election to the school board, Public Officers Law §§ 74(2), 74(3)(d), and 74(3)(f) place various restrictions on the employee's campaign biographical material and fundraising activities.<sup>140</sup>

Similarly, a number of advisory opinions have been issued concerning a State officer or employee engaged in an outside activity as a county legislator. For example, Advisory Opinion No. 93-09 did not prohibit a State employee from seeking and holding elective office when the responsibilities of elective office do not conflict with the employee's State responsibilities pursuant to Public Officers Law § 74. Public Officers Law § 73 did not prohibit a State employee's appearance before State agencies (other than his employing State agency) as a non-paid political party committeeperson so long as those matters were unrelated to his State agency responsibilities.<sup>141</sup> Public Officers Law §§ 73(4) and 73(7) prohibited the State employee, who also served as a county legislator, from making compensated appearances on behalf of any entity including the county to obtain a contract or apply for a grant of money or loan from any State agency.<sup>142</sup>

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138 See New York State Ethics Comm'n, Advisory Op. No. 92-16 (1992); see also New York State Ethics Comm'n, Advisory Op. No. 97-04 (1997) (Public Officers Law § 74 prohibits a State employee from holding elective office in a city where his job responsibilities are likely to require him to negotiate leases on property located within the city, but should the agency later determine that the individual would not generally be assigned to city projects, he could, at that time, hold such office subject to appropriate recusal requirements).

139 See New York State Ethics Comm'n, Advisory Op. No. 92-16 (1992).

140 *Id.*

141 See New York State Ethics Comm'n, Advisory Op. No. 93-09 (1993).

142 *Id.*; See also New York State Ethics Comm'n, Advisory Op. No. 96-30 (1996) (Public Officers Law § 74 did not prohibit an employee of the State University of New York from continuing to serve as a county legislator, provided that he (1) recused himself in his State position from all matters involving the county; (2) recused himself in his county legislature position from matters dealing with his agency; (3) resigned from the county legislature's education committee; and (4)

Likewise, State officers and employees may serve on town boards, with recusal as an appropriate remedy to prevent conflicts of interest. For example, Advisory Opinion No. 97-17 permitted an employee of a State psychiatric hospital to seek election to and serve as a member of a town board, provided that in the event a specific matter should arise which might create a conflict of interest or the appearance of a conflict, either in his State or elected position, the employee should recuse himself from dealing with that matter.<sup>143</sup>

### *5. Teaching and Writing*

Public Officers Law § 74 prohibits a State employee from receiving compensation for teaching a training course that is part of his job responsibilities. For example, Advisory Opinion No. 98-16 provides that an employee of the Department of Transportation, who served as an informal in-house federal Occupational Safety and Health Administration safety expert, was prohibited from teaching an Occupational Safety and Health Administration safety course as an outside activity, where the course was the type of instruction he would provide in the course of his work at the Department of Transportation.<sup>144</sup> Otherwise he would effectively be paid twice for performing his State job.

Public Officers Law §§ 73 and 74 do not prohibit a current State officer or employee from receiving royalties from a sale of a book, provided a nine-part test is satisfied (1) the book was written on his own time and not on State time; (2) no State property, personnel or other resources were utilized; (3) the subject matter was sufficiently unrelated to his job responsibilities so that authorship or the advice

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recused himself, in his State position and in his position with the county legislature, from all matters involving the community college (which operated under the aegis of the State University of New York; New York State Ethics Comm'n, Advisory Op. No. 97-21 (1997) (Public Officers Law § 74 did not prohibit an engineer employed by the State from seeking election to and serving as a member of a county legislature. In the event that a specific matter should arise that might create a conflict of interest or the appearance of a conflict, either in his State or elected position, the employee should recuse himself from dealing with that matter).

143 See New York State Ethics Comm'n, Advisory Op. No. 97-17 (1997); *see also* New York State Ethics Comm'n, Advisory Op. No. 06-03 (2006) (Public Officers Law §§ 73 and 74 did not raise a complete bar precluding an academic employee of State University of New York at Buffalo from serving as the town supervisor of a municipality that regularly considers matters involving the university. To comply with the Public Officers Law, the State employee must recuse himself as town supervisor from any matters in which the interests of the town and the university diverge. Additionally, the State employee and the university must take steps to insure that neither party conducts itself in such a way as to receive an unfair advantage or unwarranted benefit or to create the impression that they are in any way affected by the State employee's dual position).

144 See New York State Ethics Comm'n Advisory Op. No. 98-16 (1998).

or material provided in the book could not be viewed as part of his job; (4) the book was not written for an organization or audience which is regulated by, regularly negotiates with, or has contracts with the individual's employing agency; (5) the book does not identify the author as a State employee (although a biography may, among other items, list such credential); (6) the State agency where the author is employed did not advertise, otherwise promote or endorse the book; (7) the author does not advertise, otherwise promote or endorse the book when he is performing his State duties, whether involving training or otherwise; (8) the State agency does not use the book or make it available as part of any of its training programs; and (9) the book contains a disclaimer that the opinions and statements contained in the book are those of the author only and do not represent the opinion or interest of the employee's State agency or any other State agency of New York.<sup>145</sup>

Public Officers Law § 74 generally permits State officers and employees, irrespective of whether they are policymakers, to serve in employee status as part-time faculty, advisors, and mentors/tutors at the State University of New York and City University of New York, assuming the Civil Service Law dual employment requirements are met. State employees may serve as independent contractors with State University of New York and City University of New York only if the requirements of Public Officers Law §§ 73(4) and (7) have been met and there are no Public Officers Law § 74 issues with such service.<sup>146</sup>

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145 See State of New York State Ethics Comm'n, Advisory Op. No. 89-10 (1989); see also New York State Ethics Comm'n, Advisory Op. No. 96-21 (1996) (Public Officers Law § 74 does not prohibit a State employee from entering into a contract with a publisher to receive royalties for a book he authored where all the conditions of Advisory Opinion No. 89-10 have been satisfied); New York State Ethics Comm'n, Advisory Op. No. 98-15 (1998) (Public Officers Law § 74 does not prohibit a State employee from receiving royalties from the authorship and sale of a workbook, as long as the nine-factor test set forth in Advisory Opinion No. 89-10 is met, but the employee may not accept royalties from use of the workbooks by any State agency). Advisory Opinion No. 95-25 prohibited Department of Environmental Conservation attorneys who were not policymakers from receiving compensation for contributing chapters to a legal practice guide where the subject of the chapters they would be writing was related to their current job responsibilities. They could, however, contribute chapters to the guide for no compensation. Public Officers Law § 74 did not prohibit the attorney from receiving compensation for writing about areas of law unrelated to his current State responsibilities as long as all of the other conditions for receiving royalties set forth in Advisory Opinion No. 89-10 were met. The factors considered in determining whether a State employee may receive royalties from the sale of a book are set forth in Advisory Opinion No. 89-10 and are applicable to both policymakers and non-policymakers.

146 See New York State Ethics Comm'n, Advisory Op. No. 93-14 (1993); See also Conflicts of Interest and Regulated Conduct chapter relating to Business With or Against the State, Section B.

## ***6. Security Guards and Investigators***

Advisory Opinion No. 06-07 provides that police officers employed by a State public benefit corporation may not accept employment as security guards with a contractor who is performing work at an airport that the State owns and operates. In this case, the prohibition applies to both police officers employed by the airport, as well as police officers assigned to other divisions of the agency. Where police officers were assigned to the airport where the contractor was performing work, “there would be an overlap between their obligations to their appointing authority and to the runway contractor.”<sup>147</sup> Specifically, the arrangement would allow a police officer with the State to be under the control and supervision of a contractor, yet any improper activity or security lapses in the contractor’s operations would have to be identified and brought before the State. As a result, “an issue of conflicting loyalties is therefore inevitable.”<sup>148</sup> Here, there was an emphasis that the police officers’ primary obligation in law enforcement is to the State.

## ***7. Boards Licensed or Regulated by the State***

JCOPE has addressed several situations in which a State employee sought to serve on the board of an entity that is either licensed or regulated by his State agency or conducted business with the State. In such instances, a State employee, acting as a board member, has a fiduciary duty to the private board, as well as a duty to the State. Dual loyalties have the potential to present conflicts of interest which can often be alleviated by a recusal plan.

A threshold question JCOPE considers is whether the State officer or employee is a policymaker. A “policymaker, by definition, has influence in the execution of policy or assists one who does.”<sup>149</sup> Therefore, the analysis of conflicts of interests involving a policymaker differs from that of a non-policymaker.

### ***a. Policymakers***

Advisory Opinion No. 90-25 provided that a policymaker may not serve on the board of directors of a not-for-profit organization that is licensed or

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<sup>147</sup> New York State Ethics Comm’n, Advisory Op. No. 06-07 (2006).

<sup>148</sup> *Id.*

<sup>149</sup> New York State Ethics Comm’n, Advisory Op. No. 90-25 (1990).



regulated, or whose rates are set, by the employee's agency because there was an appearance of a conflict of interest. This prohibition extended to any employee under the direct control and supervision of a policymaker because "even if that policymaker is not in the line of authority to regulate or oversee the private organization on whose board he or she serves, the appearance that he or she can influence other policymakers, with whom he or she works or who have appointed him or her, clearly exists whenever favorable action is taken by the agency towards such organization." Likewise, Advisory Opinion No. 92-04 provided that a director of a State facility, who was designated as a policymaker, was prohibited from serving as an uncompensated board member of a not-for-profit agency because the State employee worked in a State agency facility that had "significant contacts" with the not-for-profit adult home and because the individual's job duties for the facility related to the adult home.

Advisory Opinion No. 95-09 distinguished the above-referenced advisory opinions from an inquiry by a State employee wanting to serve as a board member of an organization that had interests similar to those of her agency—similar to the advisory opinion discussed above, except the agency did not license or regulate the organization, nor did it act as the final arbiter in related proceedings. Nonetheless, given that the organization could take a position on an issue that may conflict with the position of the State agency, there is a potential conflict of interest. Therefore, the proposed remedy was to allow the State employee to serve on the board, provided she recuse herself from any board discussions or votes concerning a matter that involved, or could potentially involve, her agency.

Similarly, Advisory Opinion No. 97-25 provided that the director of a unit within a State agency could serve as an uncompensated board member of a not-for-profit entity that is licensed by and funded through the State agency, provided that the director abided by a recusal plan. Specifically, the State employee also must recuse himself from any matter involving the licensing, regulation, oversight or funding of such not-for-profit corporation by the State agency, and, as a State employee, he must recuse himself from any matter concerning the not-for-profit corporation.

### ***b. Non-Policymakers***

A different methodology is used for applying the Code of Ethics to non-policymakers. In these instances, instead of a broad prohibition, the following

factors are considered: (1) the employee's duties on behalf of the agency; (2) the relationship of the agency and the proposed outside activity; (3) whether the employee would be in a position to use his or her position to secure unwarranted privileges; (4) whether the outside activity would impair the employee's independence of judgment in the exercise of official duties; and (5) whether the principles of disclosure and recusal remedy any appearance of impropriety.<sup>150</sup>

Advisory Opinion No. 95-12 provided that a State employee may serve on the board of a not-for-profit corporation licensed by his State agency, where the employee is not a policymaker, his job responsibilities are removed from the agency's licensing, certification, and rate setting functions, and he has no official responsibilities with regard to the corporation. This conclusion relied upon precedent that addressed outside employment of non-policymakers with providers that are licensed or regulated by their State agency. In particular, non-policymaker employees could serve as family care providers provided they do not work in the unit that certifies or administers the family care programs<sup>151</sup> and a State employee's duties do not involve licensing and rate setting functions.<sup>152</sup>

Similarly, Advisory Opinion No. 06-08 provided that a State employee, in a non-policymaking position, was not prohibited from serving as an uncompensated president of the board of a not-for-profit agency that is licensed by and received funding from the employee's agency, where the employee's State responsibilities did not involve licensing, rate setting, or certification of providers. The approval was conditioned upon the employee recusing himself from any consideration or vote concerning a contract involving the State agency and any other specific issue on which the agency may likely take a position.

In contrast, Advisory Opinion No. 98-11 provided that Public Officers Law § 74 prohibited a non-policymaker from serving as an officer of a not-for-profit corporation that had entered into a memorandum of understanding administered by the employee's division in the State agency. In this case, the not-for-profit corporation's work was "inexorably intertwined" with the work of the employee's division and the entities would have an "extremely close working

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150 New York State Ethics Comm'n, Advisory Op. No. 06-08 (2006), *see also* New York State Ethics Comm'n Advisory Op. No. 06-01 (2006).

151 *See* New York State Ethics Comm'n, Advisory Op. No. 91-11 (1991); *see also* New York State Ethics Comm'n, Advisory Op. No. 94-17 (1994).

152 New York State Ethics Comm'n, Advisory Op. No. 91-03 (1991).

relationship.” In essence, the nature of the outside activity was such that recusal was insufficient to avoid a conflict of interest.

### ***8. Service on Corporate Boards in Official Capacity***

There are also limitations on a State employee’s involvement on private corporate boards, even if such membership is in the State employee’s official capacity. Before 2001, various State employees automatically could not serve in their official capacities as board members of corporations, including both for-profit and not-for-profit corporations.<sup>153</sup> However, in 2001 Advisory Opinion No. 01-01 provided that State interests could still be advanced by an employee, even when the public officer served as a corporate board member. As a result, officers and employees of State agencies may serve in their official capacities on boards of corporations without violating Public Officers Law § 74, provided that they always act in the best interest of the State.

### ***9. Involving Co-workers and Superiors in Private Business***

Advisory Opinion No. 92-23 considered whether an arrangement by which the head of a State agency invited some of the employees under his supervision to engage in compensated outside employment also under his supervision was appropriate under Public Officers Law § 74. Public Officers Law § 74 prohibited the head of a State agency, engaged in outside consulting activities, from requesting that his subordinate State employees participate in that outside employment because such arrangement would create an impermissible appearance of a conflict of interest.<sup>154</sup>

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153 See New York State Ethics Comm’n, Advisory Op. No. 99-04 (1999); *see also* New York State Ethics Comm’n, Advisory Op. No. 95-36 (1995); New York State Ethics Comm’n, Advisory Op. No. 93-03 (1993).

154 See New York State Ethics Comm’n, Advisory Op. No. 92-23 (1992).

## **GIFTS, HONORARIA, AND OFFICIAL ACTIVITY EXPENSE PAYMENTS**

### **A. Introduction**

A State officer or employee, member of the Legislature or legislative employee (hereinafter “covered person”) may not receive items of value or compensation from individuals and entities that do business or have other relationships with the State. In many cases, acceptance of an item may create a conflict of interest with respect to the covered person’s State employment. JCOPE’s predecessors issued specific guidance regarding gifts in Advisory Opinion Nos. 94-16 and 08-01. The Public Integrity Reform Act of 2011 significantly amended the statutory provisions governing gifts to public officials. Consequently, in 2014, JCOPE promulgated gift regulations for State employees and lobbyists in 19 NYCRR Parts 933 and 934. To the extent prior advisory opinions are inconsistent with the regulations, the regulations are controlling.

### **B. Prohibited Gifts**

#### ***1. General Rules***

Public Officers Law § 73(5) provides that no covered person “shall, directly or indirectly solicit, accept or receive any gift having more than a nominal value under circumstances in which it could reasonably be inferred that the gift was intended to influence him or her, or could reasonably be expected to influence him or her, in the performance of his or her official duties or was intended as a reward for any official action on his or her part.”<sup>155</sup>

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<sup>155</sup> N.Y. Pub. Off. Law § 73(5).

A gift includes, but is not limited to, money, services, loans, travel, lodging, meals, refreshments, entertainment, forbearance, or a promise having a monetary value. A job offer, under certain circumstances, may also be considered a gift. JCOPE does not specifically define “nominal value,” but, generally, any item that has a fair market value of fifteen dollars or less is considered to be of nominal value.<sup>156</sup>

If a gift is offered by an “interested source,” the acceptance of the gift is generally prohibited. An “interested source” is a person or entity that (1) is regulated by or appears before the covered person’s State agency; (2) has contracts with, or seeks contracts with, the covered person or the State agency; (3) is a registered lobbyist or client of a lobbyist that lobbies the State agency; (4) is the spouse or the minor child of a registered lobbyist or client of a lobbyist that lobbies the State agency; (5) is involved in ongoing litigation that is adverse to the covered person or the State agency; (6) has received or applied for funds from the State agency at any time during the previous year up to and including the date of the proposed or actual receipt of the gift; or (7) attempts to influence the covered person or the State agency in an official action.<sup>157</sup>

Further, the regulations provide that a covered person may not direct a gift that is impermissible under Public Officers Law § 73(5) or 19 NYCRR Part 933.3(a)-(b) to any third party, including a charitable organization.

It is important to note that Public Officers Law § 73(5) does not apply to unpaid and per diem officers of New York State departments, boards, bureaus, divisions, commissions, councils, other State agencies, public authorities, and public benefit corporations. However, Public Officers Law § 74, the Code of Ethics, still applies. Thus, although per diem and unpaid officers are not covered by § 73(5), these individuals should still consider whether accepting a gift—particularly from an interested source—is prohibited because it gives the appearance of a conflict of interest.

For example, under the gift rules and regulations, a covered person cannot receive a “tip,” “reward” or “finder’s fee” for performing his or her State duties. A SUNY Cortland employee violated Public Officers Law § 73(5) by accepting cash tips and other items as a reward for his State service. Over a period of several years, the employee accepted cash tips, sports apparel, and tickets totaling approximately \$4,700 as a reward for his State job washing and

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<sup>156</sup> 19 NYCRR 933.2(q).

<sup>157</sup> See 19 NYCRR 933.2(1).

cleaning laundry and sports equipment. In a joint settlement with SUNY, the employee agreed to give back the value of the gifts received.<sup>158</sup> Additionally, an Assistant Facility Program Manager employed by SUNY Downstate Medical Center, agreed to pay a fine of \$4,000 to settle the claim that he improperly accepted bonus payments from a vendor leasing the facility to SUNY while his State responsibilities included coordinating with the vendor's employees to maintain the facility.<sup>159</sup> Similarly, a former OGS employee violated Section 74(3)(d) by accepting more than \$6,000 in payments, deemed "finder's fees", for assisting a vendor in finding sponsors for events held in the OGS facility that he managed, which was part of his job.<sup>160</sup> In a settlement with the Commission, the former employee agreed to pay \$9,000 in fines.

## ***2. Violations***

JCOPE may assess a civil penalty for a violation of POL § 73(5) in an amount not to exceed \$40,000 and the value of any gift, compensation, or benefit received in connection with a gift violation. In addition to a civil penalty, JCOPE may refer a violation to the appropriate prosecutor, and upon conviction, such violation is punishable as a class A misdemeanor. A State agency may also take disciplinary action against the subject, including, but not limited to, dismissal from his or her employment.<sup>161</sup>

## **C. Permitted Gifts**

Some items are not "gifts" under the law and are excluded from the statutory definition of gifts. Nevertheless, before accepting *any* item, a State officer or employee must consider the Code of Ethics. In other words, a State officer or employee may accept "excluded" items or services from any person or entity (including an interested source) so long as it does not create an actual or apparent conflict of interest or give the impression of improper influence. The following are gift exclusions.

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158 See *In re Partigianoni*, Case No. 13-166, New York State Joint Commission on Public Ethics Enforcement Actions (Jun. 12, 2014).

159 See *In re Recevuto*, Case No. 17-097, New York State Joint Commission on Public Ethics Enforcement Actions (May 11, 2018).

160 See *In re Walker*, Case No. 13-100, New York State Joint Commission on Public Ethics Enforcement Actions (Dec. 18, 2018).

161 See N.Y. Pub. Off. Law § 73(18).

### ***1. Contracted Items, Items Purchased at Market Value, and Certain Rewards or Prizes***

Pursuant to 19 NYCRR Part 933.4, a covered person may accept anything for which he or she has paid fair market value. Similarly, anything for which the State has paid or secured by State contract is not a gift. For example, a State agency may contract with a vendor to provide specific live training programs to agency employees, including meals and refreshments.

A covered person may also accept rewards or prizes given to competitors in contests or events (including random drawings) offered to the general public or a segment of the general public defined on a basis other than status as a State officer or employee.<sup>162</sup>

### ***2. Awards or Plaques in Recognition of Public Service***

A covered person may accept awards, plaques, and other ceremonial items that are publicly presented, or intended to be publicly presented, and must be in recognition of service related to the employee's official duties and responsibilities.

Such awards, plaques, and other ceremonial items must be of the type customarily bestowed at similar ceremonies and be otherwise reasonable in value under the circumstances. Advisory Opinion No. 08-01 sets forth factors to be considered in determining whether the item is customarily bestowed and reasonable in value, including, but not limited to, the monetary value of the gift to the recipient and whether the gift is personally engraved with the recipient's name.<sup>163</sup>

### ***3. Honorary Degrees***

The regulations permit a covered person to accept an honorary degree bestowed by a public or private college or university.

### ***4. Promotional Items with No Resale Value***

A covered person may accept items having no substantial resale value such as pens, mugs, calendars, hats, and t-shirts which bear an entity's name, logo, or message in a manner which promotes the entity's cause. Often the sponsor of an event will assign a value to such promotional items.

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<sup>162</sup> See 19 NYCRR 933.4(a)(3).

<sup>163</sup> See 19 NYCRR 933.4(a)(8).

### ***5. Discounts Available to the General Public, or a Broad Segment Thereof***

A covered person may accept goods and services, or discounts for goods and services, offered to the general public or a segment of the general public defined on a basis other than status as a State officer or employee *and* offered on the same terms and conditions as the goods and services are offered to the general public or segment thereof.

When a discount is offered to a *select* group of State officers or employees, the employee must consider (1) the scope of the class of State officers or employees who are offered the discount; (2) the amount and duration of the discount; (3) whether the criterion for the offer is based on factors other than the employee's official duties and responsibilities; and (4) whether the gift-giver is an interested source.<sup>164</sup>

Advisory Opinion No. 05-01 addressed whether a State employee could receive a hotel room discount by showing his or her State identification at the time of check in, even when the State employee advised hotel management that he was not traveling on official State business. The discount was permitted because it was available to all State employees and, therefore, it was not reasonable to infer that the offering of the discount was a means to influence any individual State employee.<sup>165</sup>

Some vendors that do business with the State offer rewards or points for certain purchases that can be redeemed for other benefits, such as additional goods, services, or "cash back." Advisory Opinion No. 08-04 determined that a State employee may not personally use rewards or points accumulated from the purchase of goods or services for State use.<sup>166</sup> However, employees can use, for personal purposes, travel rewards or points accumulated as a result of traveling on State business.<sup>167</sup>

JCOPE urges State officers and employees to also refer to his or her agency's travel policies, which may be stricter than the rules set forth in both the advisory opinions and the regulations.

### ***6. Gifts from Those with Whom There is a Familial or Personal Relationship***

A covered person may accept gifts from a family member or a person with a personal relationship with the State employee when it is reasonable to infer that the

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164 See 19 NYCRR 933.4(a)(11).

165 See New York State Ethics Comm'n, Advisory Op. No. 05-01 (2005).

166 New York State Comm'n on Pub. Integrity, Advisory Op. No. 08-04 (2008).

167 *Id.*



gift was primarily motivated by the family or personal relationship. Personal gifts may include, for example, an invitation to attend a personal or family social event.

The regulations set forth factors a covered person must consider in determining if the gift-giving was primarily motivated by a family or personal relationship (1) the history and nature of the relationship between the individual offering the gift and the recipient, including whether items have previously been exchanged; (2) whether the item was purchased by the individual offering the gift; and (3) whether the individual offering the gift at the same time gave similar items to other State officers or employees.<sup>168</sup>

The regulations expressly prohibit a covered person from accepting an item or invitation if the gift-giver seeks to write it off as a business expense for tax purposes or seeks reimbursement from his or her client.<sup>169</sup>

### ***7. Contributions Reportable under the Election Law***

Contributions reportable under article fourteen of the Election Law, including contributions made in violation of the law, are not gifts under the Public Officers Law and the Lobbying Act.<sup>170</sup> In other words, regardless of whether a contribution was made properly or improperly, under the Election Law, it is excluded from the definition of a gift. However, as mentioned above, State officers and employees must always comport themselves within the Code of Ethics, even when soliciting and accepting campaign contributions, as most recently articulated in Advisory Opinion No. 16-02.<sup>171</sup>

### ***8. Meals for Participants at a Professional or Educational Program***

A covered person may accept food and/or beverages when participating in a professional program or educational program as a part of that employee's official duties, provided the food and/or beverages are available to all participants.

The regulations define an educational program as "formal instruction provided to attendees. Factors to be considered in assessing whether a program is educational include, but are not limited to: the curriculum; whether the

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168 See 19 NYCRR 933.4(a)(12).

169 *Id.*

170 See 19 NYCRR 933.4(a)(4).

171 See New York State Joint Comm'n. Pub. Ethics, Advisory Op. No. 16-02 (2016).

entity providing the program, or the instructors, are accredited, certified, or otherwise qualified to provide the program; to whom the program is presented; and where and how the program is presented.”<sup>172</sup>

A professional program is defined as “a program that provides information, such as trends in an industry or discipline, which would benefit the administration or operation of the State and would enable a covered person to perform his or her duties more effectively. It shall not include a program, the primary purpose of which is the promotion or marketing of products or services for purchase or lease by the State.”<sup>173</sup>

### ***9. Reimbursement for Speakers at Informational Events***

A covered person may accept travel reimbursement or payment for transportation, meals, and accommodations for an attendee, panelist, or speaker at an informational event<sup>174</sup> when such reimbursement or payment is made by a governmental entity or by an in-state accredited public or private institution of higher education that hosts the event on its campus, provided, however, that the covered person may only accept lodging from an institution of higher education (1) at a location on or within close proximity to the host campus; and (2) for the night preceding and the nights of the days on which the attendee, panelist, or speaker actually attends the informational event.<sup>175</sup>

### ***10. Provision of Local Transportation to Inspect Facilities***

A covered person may accept local transportation to inspect or tour facilities, operations, or property located in New York State, when such inspection or tour is related to his or her official duties or responsibilities. This exclusion does not cover the payment or reimbursement for expenses for lodging or travel expenses to and from the locality where such facilities, operations, or property are located.<sup>176</sup> The acceptance of such payment or reimbursement is governed by the Official Activity Expense Payments regulations in 19 NYCRR 931.

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172 19 NYCRR 933.2(h).

173 19 NYCRR 933.2(t).

174 The regulations define informational event as “an event or meeting the primary purpose of which is to provide information about a subject or subjects related to a Covered Person’s official responsibilities.” 19 NYCRR 933.2(k).

175 See 19 NYCRR 933.4(a)(13).

176 19 NYCRR 933.4(a)(14).

### ***11. Food or Beverage Valued at Fifteen Dollars or Less Per Event***

The regulations permit accepting food or beverage valued at fifteen dollars or less—considered to be of “nominal value”—per event. However, the regulations note that a State officer’s or employee’s acceptance of multiple gifts of nominal value may violate other ethics rules:

nothing in this Part shall be construed as relieving a Covered Person’s obligations under Public Officers Law § 74 with respect to the solicitation, receipt, or acceptance of multiple items, services, or any other things of value that, individually, are not gifts solely because each has less than nominal value.<sup>177</sup>

As mentioned above, the Code of Ethics must be considered even when the gift rules do not bar the receipt of such a gift.

### ***12. Complimentary Attendance at a “Widely Attended Event”***

Covered persons often attend conferences and other events as part of their State job duties. On occasion, the sponsor of the event may offer complimentary attendance to invitees. The regulations define complimentary attendance as:

the waiver of all or part of a registration or admission fee, or waiver of all or part of a fee or charge for the provision of food, beverages, entertainment, instruction, or materials. “Complimentary Attendance” shall include the awarding of continuing education credits or certification for attendance at a program provided such credits or certification are offered to all attendees. “Complimentary Attendance” shall not include travel, lodging, or items of more than nominal value.<sup>178</sup>

To qualify as a “widely attended event”:

1. Complimentary admission must be offered by the *sponsor* of the event;
2. at least twenty-five individuals other than members, officers, or employees from the governmental entity in which the covered person serves attend or were, in good faith, invited to attend in person; and
3. the event must be related to the attendee’s duties or responsibilities or allow the covered person to perform a ceremonial function appropriate to his or her position.

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<sup>177</sup> 19 NYCRR 933.5.

<sup>178</sup> 19 NYCRR 933.2(f).

- a. For the purposes of this exclusion, a covered person's duties or responsibilities shall include but not be limited to (1) For elected covered persons (or their staff attending with or on behalf of such elected officials) only, attending an event or a meeting at which more than one-half of the attendees, or persons invited in good faith to attend in person, are residents of the county, district, or jurisdiction from which the elected covered person was elected or (2) For all covered persons, attending an event or a meeting at which a speaker or attendee addresses an issue of public interest or concern as a significant activity at such event or meeting.<sup>179</sup>

An event may be considered related to the covered person's "official duties or responsibilities" if there is a speaker at the event who addresses an issue of public interest or concern. To this end, a networking event alone, without a program addressing a topic related to his or her State job, will not be considered related to that person's official duties or responsibilities.

Food and beverage is only permissible if offered to all participants. The exclusion does not cover entertainment, recreational, or sporting activities unless the presentation addressing the issue of public interest or concern is delivered *during* the entertainment, recreational, or sporting activity. Further, covered persons must seek approval from their agency's ethics officer prior to attending a widely attended event.<sup>180</sup>

### ***13. Complimentary Attendance, including Food and Beverage, at a "Bona Fide Charitable Event" or a "Bona Fide Political Event"***

A covered person may accept complimentary attendance to a *bona fide* charitable event if the event's primary purpose is to provide financial support to an organization that is either registered as a charity with the New York State Office of the Attorney General, unless exempt, or is otherwise qualified under § 501(c)(3) of the Internal Revenue Code. To fit within the political event exception, the event's primary purpose must be to provide financial support to a political organization or a candidate for public office as defined in the Public Officers Law.<sup>181</sup>

To illustrate the difference between the above three types of exclusions consider if an event host or sponsor offered complimentary attendance to an event,

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179 19 NYCRR 933.4(a)(7).

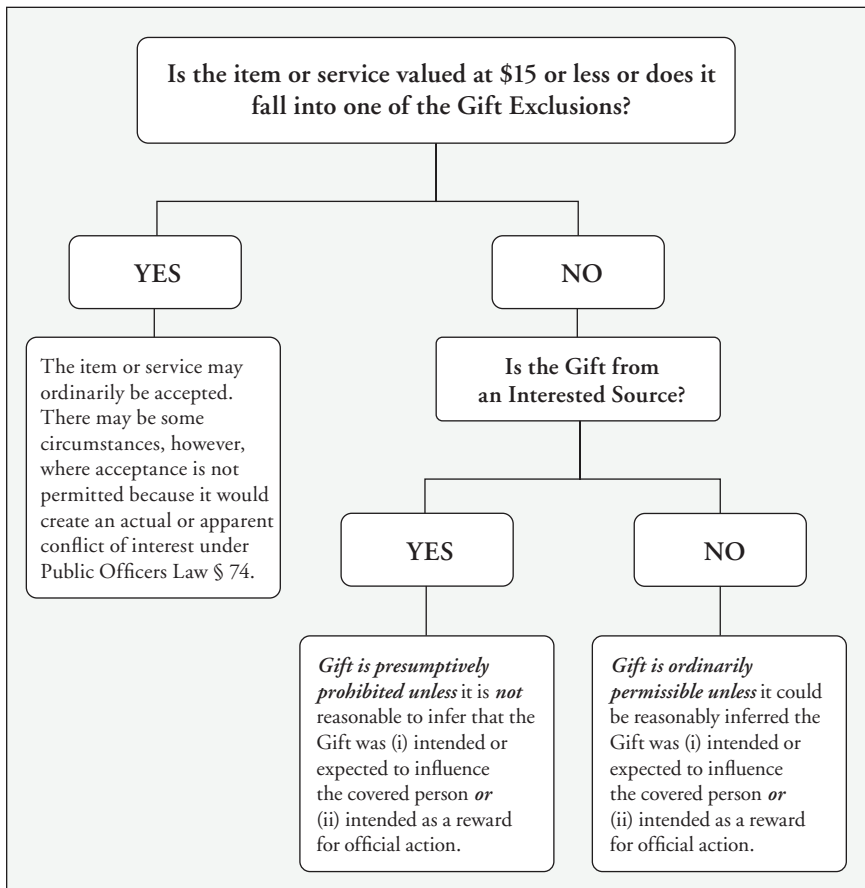
180 *Id.*

181 *See* 19 NYCRR 933.2(a)-(b).

including a round of golf, to attendees including a State employee. As noted above, such an offer is expressly prohibited within the widely attended event exclusion, unless a presentation regarding an issue of public concern is given during the recreational activity. In the case of a charitable or political event, however, the round of golf could be permitted under the gift rules. Nevertheless, a covered person must always evaluate the offer in light of the Code of Ethics. If the host of a charitable event has business before or is regulated by the employee or the employee's State agency, it may be advisable for the covered person to decline the offer given the appearance of a conflict such attendance might create.

#### D. Gift Analysis

The following guide illustrates whether a covered person may accept a gift:



## E. Gifts to Agencies

The Code of Ethics, while applying to individual covered persons, does not specifically govern the conduct of a State agency.<sup>182</sup> Generally, a State employee may accept a gift on behalf of an agency from outside sources. Advisory Opinion No. 08-01, however, provides that an agency shall not accept gifts from persons or entities that, at the time, are under investigation by the agency, or involved in litigation with the agency.<sup>183</sup> It further noted that other categories of gift-givers could raise an appearance of impropriety, such as an entity that engages in business with the agency.<sup>184</sup> In these instances, the acceptance of the gift must be subject to careful analysis regarding the source, timing, and value of the gift before it is accepted.<sup>185</sup>

Gifts to an agency should not be solicited or accepted by those employees within the agency who directly interact with the donor regarding, for instance, matters involving contracts, licensure, regulations, investigations, and litigation. Additionally, a gift cannot be conditional (i.e., the donor cannot specify the purpose of the gift or the person to whom it must go).<sup>186</sup>

For example, in Advisory Opinion No. 99-04, the New York State Emergency Management Office planned to create a not-for-profit corporation as part of its Joint Loss Reduction Partnership Program, the goal of which was to allow for increased cooperation between the public and private sectors in enacting mitigation measures in responses to disasters. The not-for-profit corporation would solicit private and public contributions to fund the program. After holding that the New York State Emergency Management Office employees could act as advisors to the not-for-profit, the Opinion states that employees could not solicit private sector funds for the not-for-profit, reasoning that the key distinction was whether the not-for-profit would be more like a private or a public entity. The entity would be more private in nature because it would include representatives of private sector entities that would be pursuing

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182 Note that statutes authorize some State entities and officials like the Office of Emergency Management, Division of Veterans Affairs, and the Commissioner of the Office of General Services to accept gifts. See Exec. Law §§ 29-j and 355 and Pub. Bldgs. Law § 3, respectively.

183 See New York State Comm'n on Pub. Integrity, Advisory Op. No. 08-01 (2008).

184 *Id.*

185 *Id.*

186 *Id.*; see also New York State Ethics Comm'n, Advisory Op. Nos. 92-01, 95-38, 96-02, 97-10 (discussing the statutory authority for an agency to accept gifts); New York State Ethics Comm'n, Advisory Op Nos. 96-22 and 03-05 (discussing acceptance of a gift vs. exchange for consideration).

their own interests. Since private perspectives would play an important and legitimate role, the corporation would not be purely public. Thus, solicitation by New York State Emergency Management Office employees in their official capacities would constitute soliciting on behalf of a private entity, which is not permissible.<sup>187</sup>

## **F. Honoraria**

Generally, an honorarium is a payment or other form of compensation that is offered in exchange for a professional service or activity that is *not* part of the covered person's official duties. Examples include: giving a speech, writing an article, or serving on a panel at a seminar or conference. An honorarium may include expenses incurred for travel, lodging, and meals related to the service performed.<sup>188</sup>

A covered person must submit a request for approval in writing to the agency's ethics officer or other designated person before performing the service or activity. Statewide elected officials and State agency heads must submit an approval request to JCOPE.<sup>189</sup>

A request to accept an honorarium may be approved provided the following conditions are met (1) State personnel, equipment, and time are not used in preparing the service for which an honorarium is offered; (2) no State funds are used to pay the employee's attendance, registration, travel, lodging, or meal expenses; (3) if the service is to be performed during the employee's official work day, he or she must charge accrued leave (other than sick leave) to perform such service; (4) if the honorarium is offered by or on behalf of an interested source, it may only be accepted if it is unreasonable to infer that the honorarium was intended or expected to influence the covered person, or intended as a reward; (5) the ethics officer or approving authority determines that the offeror is not being used to conceal that the honorarium is actually offered or paid by an interested source; and (6) neither performing the service or activity for which the honorarium is offered nor accepting the honorarium violates the Code of Ethics.<sup>190</sup>

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187 See New York State Ethics Comm'n, Advisory Op. No. 09-04 (2009).

188 See 19 NYCRR 930.2(e).

189 See 19 NYCRR 930.4.

190 See 19 NYCRR 930.5.

Faculty members of State University of New York, City University of New York, and State officers and employees with the titles of Research Scientist, Cancer Research Scientist, Research Physician, Research Psychiatrist, and Psychiatrist are exempt from the honoraria approval procedures (including the conditions for approval), provided that the service performed is within the subject matter of their official academic or research discipline.<sup>191</sup>

Public Officers Law § 73-a provides that financial disclosure statement filers—even those who are exempt from the honoraria approval procedures—shall report any honorarium in excess of \$1,000 (or all honoraria the aggregate total of which exceed \$1,000 received from a single offeror) on his or her financial disclosure statement for the applicable year. Officers of State boards, commissions, or councils who receive no compensation or are compensated on a per diem basis are not required to report honoraria on their financial disclosure statement.<sup>192</sup>

### **G. Official Activity Expense Payments**

A covered person may accept payment or reimbursement from third parties for travel and other expenses for an activity that is *part of, and related to*, his or her State job duties, provided certain conditions are met. A State officer or employee<sup>193</sup> must submit a request for approval in writing to the agency's ethics officer or other designated person within a reasonable period of time *before* engaging in the official activity.<sup>194</sup>

Payment or reimbursement from an interested source is ordinarily impermissible. In addition, the mode of travel and related expenses must be in accordance with the agency's travel policy. Financial disclosure statement filers must report all official activity expense payments in excess of \$1,000, or all official activity expense payments the aggregate total of which exceed \$1,000 received from a single offeror.

### **H. Additional Gift Rules**

A covered person's solicitation of certain job offers may violate the gift rules. Advisory Opinion No. 06-01 provides guidance for State employees

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191 See 19 NYCRR 930.7.

192 See 19 NYCRR 930.9.

193 Statewide elected officials and State agency heads submit requests to JCOPE.

194 See 19 NYCRR 931.3(b).



approached by entities or individuals that have matters under consideration by the State employee concerning potential employment opportunities in the private sector.<sup>195</sup>

Public Officers Law §§ 73 and 74 prohibit a covered person from soliciting a post-State employment opportunity with any non-governmental entity or individual that has a specific pending matter before the State employee. A covered person who receives an unsolicited employment-related communication from such an entity or individual must promptly notify his or her ethics officer and supervisor, and then recuse himself or herself from the matter, avoid any further official contact with the entity or individual, and wait thirty days from such recusal before entering into employment communications with the entity or individual. The covered person must notify his or her supervisor and ethics officer of such a communication, whether or not he or she intends to pursue it.<sup>196</sup>

Advisory Opinion No. 06-01 notes that Public Officers Law §§ 73 and 74 also require a State employee to wait thirty days from the time a matter is closed or the employee has no further involvement with the matter because of recusal or reassignment, before soliciting or following up on an offer of post-State employment.<sup>197</sup>

In 2014, an Office of the Medicaid Inspector General employee accepted a job offer and meals from a vendor whose contract he oversaw as part of his State job duties. JCOPE fined the employee \$14,000 in settlement of his violations of the Public Officers Law.<sup>198</sup>

## **I. Gifts from Lobbyists**

Section 1-m of the Lobbying Act and 19 NYCRR 943.5(c)(1) of the Comprehensive Lobbying Regulations generally provide that no lobbyist, client, or spouse, or unemancipated child of a lobbyist or client shall offer or give a gift to a public official under circumstances where it is reasonable to infer that the gift was intended to influence such public official.<sup>199</sup>

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195 New York State Ethics Comm'n, Advisory Op. No. 06-01 (2006).

196 *Id.*

197 *Id.*

198 *See In re Flora*, Case No. 14-084, New York State Joint Commission on Public Ethics Enforcement Actions (Nov. 17, 2015).

199 Lobbying Act § 1-m, 19 NYCRR 943.5(c)(1).

It is presumptively impermissible for a lobbyist or client (as defined under the Lobbying Act) to offer or give a gift to any public official.<sup>200</sup> Such a gift is only permissible if, under the circumstances, *all* of the following criteria are met (1) it is not reasonable to infer that the gift was intended to influence the public official; (2) the gift could not reasonably be expected to influence the public official, in the performance of his or her official duties; and (3) it is not reasonable to infer that the gift was intended as a reward for any official action on the public official's part.<sup>201</sup> Further, the gift regulations relating to lobbyists and their clients in Part 934 sets forth the same rule regarding multiple gifts and the same list of gift exclusions found in Part 933 (the gift regulations for State officers and employees).<sup>202</sup>

The Lobbying Act gift bar does not apply to gifts to officers, members, or directors of boards, commissions, councils, public authorities, or public benefit corporations who receive no compensation or are compensated on a per diem basis, unless the person listed on the statement of registration appears or has matters pending before the board, commission, or council on which the recipient sits.

## J. Third Party Gifts

The Lobbying Act, the Public Officers Law, and the Commission's regulations restrict gifts that a public official may direct to a third party, or that are made or offered to a third party on a public official's "designation or recommendation or on his or her behalf."<sup>203</sup>

The permissibility of a gift to a third party requires additional scrutiny that is not involved in the context of a direct gift; namely, consideration of whether there is a nexus between the gift and the public official. For instance, depending upon the circumstances, a public official's *mere reference* to a specific charity, organization, or public cause may constitute directing, designating, or recommending that a gift be tendered to a third party.

Generally, a gift that is solicited by a public official from an interested source—either through personal solicitation, an intermediary with the official's

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200 19 NYCRR 934.3.

201 *Id.*

202 See 19 NYCRR 933 and 934.

203 See Public Officers Law § 73(5)(c); 19 NYCRR 933.3(d) and 934.3(e).

knowledge, or other conduct demonstrating the official's awareness of the solicitation or acknowledgement of the gift—is presumptively prohibited.

This presumption can be overcome by analyzing the totality of the circumstances surrounding the gift including a review of the nature of the solicitation; the substance of the communication; the nature and purpose of the gift; the nature and purpose of the third-party recipient; the public official's knowledge of the solicitation; the nature of the pending business between the public official and the third-party recipient; the nexus between the solicitation and pending business; and the offeror's history of making gifts to similar organizations or supporting similar causes.

Two lobbying entities entered into settlements with the Commission arising out of contributions to a not-for-profit entity in response to direct solicitations from an elected official and his representative. One lobbyist contributed his own funds as well as collected funds from nine of his lobbying clients. As part of a settlement, the lobbyist agreed to pay a fine of \$40,000.<sup>204</sup> Another lobbying entity agreed to pay a fine of \$10,000 in connection with two separate donations made at the request of the public official and the public official's representative.<sup>205</sup>

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204 See *In re Capalino and Associates*, Case No. 16-090, New York State Joint Commission on Public Ethics Enforcement Actions (Mar. 30, 2018).

205 *In re NYCLASS, Nislick, and Neu*, Case No. 17-088, New York State Joint Commission on Public Ethics Enforcement Actions (Apr. 5, 2018).

## NEPOTISM

Public Officers Law § 73 specifically addresses nepotism. Public Officers Law § 73(14)(a) prohibits a statewide elected official, State officer or employee, member of the Legislature or legislative employee from participating in any decision to hire, promote, discipline, or discharge a relative for any compensated position with a State agency, public authority or the legislature.<sup>206</sup> Further, Public Officers Law § 73(15)(a) prohibits such individuals from participating in any State contracting decision involving more than a \$1,000 payment to that individual, any relative of that individual, or any entity in which the individual or his relative has a financial interest. Moreover, Public Officers Law § 73(15)(b) prohibits such individuals from investing public funds in any security of an entity in which the individual or his or her relative has a financial interest. The Public Officers Law defines a relative as “any person living in the same household as the covered individual or any person who is a direct descendant of that covered individual’s grandparents or the spouse of such descendant.”<sup>207</sup>

While the statute does not define “participate,” JCOPE generally construes that term to mean personally attempting to influence or cause a particular outcome with respect to the hiring, promotion, discipline, or discharge of an employee. Participating in an employment-related decision includes, but is not limited to,

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206 Pursuant to N.Y. Pub. Off. Law § 73(14)(b), this prohibition does not apply to “(i) the hiring of a relative by a legislator with a physical impairment, for the sole purpose of assisting with that impairment, as necessary and otherwise permitted by law; (ii) the temporary hiring of legislative pages, interns and messengers; or (iii) responding to inquiries with respect to prospective hires related to an individual covered” by § 73(14)(a).

207 N.Y. Pub. Off. Law § 73(1)(m).

recommending a candidate for employment, signing a document authorizing the hiring or appointment of a candidate for employment, evaluating or reviewing an employee's job performance, determining disciplinary action against an employee, and deciding the suspension or termination of an employee.

There are, in addition, advisory opinions that address circumstances implicating nepotism not found under Public Officers Law § 73(14). For example, Advisory Opinion No. 91-21 found that it would not violate Public Officers Law § 74 if a State agency were to award a no-bid consulting contract to a firm owned and operated by the sibling of an employee of that agency, designated as a policymaker, provided that (1) the employee had no interest, financial or otherwise, in the sibling's firm; (2) the employee's regular job duties did not encompass the selection of the consultant or the review or oversight of the consultant contract, or, if the job duties did encompass such involvement, the employee was completely screened out from the consideration and appointment of such a firm or contract; (3) the employee fully disclosed to the State agency's staff his relationship to the firm's principals and recused himself from any role in considering or approving a contract with the firm; and (4) should the firm be selected for a contract, the employee's supervisor approved the selection of the contract on its merits.<sup>208</sup>

Advisory Opinion No. 94-22 found that the Public Officers Law was not violated when a State employee recommended that his agency use a vendor, the president of which was the State employee's former brother-in-law. The State employee did not make a compensated appearance or render compensated services on behalf of the vendor, so no violation of Public Officers Law § 73(7) occurred. There was also no indication that the State employee was motivated by personal interest, financial or otherwise, or that he used his position to secure a contract for the vendor in violation of Public Officers Law § 74. The former familial relationship between the State employee and the vendor's president did not preclude the agency from selecting the vendor, provided that (1) the State employee disclosed the relationship; (2) the State employee had no interest, financial or otherwise, with the vendor and would not be compensated by the vendor for services rendered under the contract with the agency; (3) the employee did not utilize the vendor's services; and (4) the agency took steps to

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208 New York State Ethics Comm'n, Advisory Op. No. 91-21 (1991).

insure that the selection of the vendor was based on the merits.<sup>209</sup>

JCOPE has settled a number of nepotism cases. For example, where a Chief Officer of Customer Service and Security for the Metropolitan Transportation Authority (MTA) asked his subordinates to assist his son in obtaining employment within the MTA by, among other things, guiding him through the process and submitting his resume for different positions, and his son was eventually hired as a Computer Specialist in his division at the agency, the respondent agreed to pay JCOPE \$1,500 to settle a Public Officers Law § 73(14)(a) violation.<sup>210</sup>

In another clear violation of Public Officers Law § 73(14)(a), an Auburn Correctional Facility Industry Superintendent participated in hiring his nephew as an Industrial Training Supervisor 2, by supervising his subordinate during the interview process and directly participating in the selection process for such position by approving the selection of his nephew over another candidate. JCOPE settled with the respondent, who agreed to pay a \$1,500 fine for such conduct.<sup>211</sup>

Nepotism-related conduct may also result in other Public Officers Law violations, such as a breach of the State's Code of Ethics. For example, JCOPE conducted an investigation into the Chief Information Security Officer at Bronx Community College (part of the City University of New York), who attempted to assist his fiancée in obtaining a permanent position at the college. The respondent asked the Interim Registrar of the college to place the fiancée—who was in a non-permanent position in the college's library—in a full-time position at the registrar's office, in exchange for assisting the Interim Registrar in

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209 New York State Ethics Comm'n, Advisory Op. No. 94-22 (1994).

210 *See In re Castellaneta*, Case No. 15-016, New York State Joint Commission on Public Ethics Enforcement Actions (Jul. 24, 2015); *see also In re Fergus*, Case No. 15-148, New York State Joint Commission on Public Ethics Enforcement Actions (Feb. 24, 2016) (JCOPE fined a Facilities Manager working for the Metropolitan Transportation Authority \$2,500 for, among other things, contacting several Metropolitan Transportation Authority Metro-North Railroad employees in an attempt to influence potential employment decisions concerning his son, who was a trainee in a Metro-North Railroad conductor class in violation of Public Officers Law § 73(14)(a)).

211 *See In re Weaver*, Case No. 15-046, New York State Joint Commission on Public Ethics Enforcement Actions (Oct. 27, 2016). Similarly, a Metropolitan Transportation Authority employee admitted that she actively participated in the hiring of her domestic partner for a position in a unit under her chain of command, including recommending her partner to human resources, initiating discussions regarding her partner's qualifications, and giving final hiring approval. The employee agreed to pay \$3,500 in settlement of the Public Officers Law § 73(14)(a) violation. *See In re Herrington*, Case No. 13-123, New York State Joint Commission on Public Ethics Enforcement Actions (Aug. 26, 2014).

obtaining the Registrar position. In his settlement agreement with JCOPE, the respondent agreed to pay \$1,500 for this violation of Public Officers Law § 74(3)(d), which provides that no State employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others.<sup>212</sup>

In another example of nepotism-related misconduct, JCOPE investigated a matter where the Vice President of Technology and Information Services at the MTA New York City Transit asked a subordinate about available jobs for his son, and the subordinate contacted a vendor, who ultimately hired the son. Thereafter, the MTA employee recused himself from procurement matters involving the vendor and admitted that such conduct violated Public Officers Law § 74(3)(d) and agreed to pay a \$3,000 fine in settlement of the violation.<sup>213</sup>

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212 *See In re Lacay*, Case No. 18-065, New York State Joint Commission on Public Ethics Enforcement Actions (Feb. 6, 2019).

213 *See In re Gellineau*, Case No. 16-118, New York State Joint Commission on Public Ethics Enforcement Actions (Jan. 19, 2017).

## POST-EMPLOYMENT RESTRICTIONS

### A. Introduction

Ethical considerations arise when former State employees apply knowledge, experience and contacts they gained through State service, potentially to benefit themselves or others, in their post-State activities in the private sector. The Public Officers Law addresses these concerns by imposing certain restrictions – commonly called the post-employment restrictions – on most State employees’ professional activities after leaving State employment.<sup>214</sup> The post-employment restrictions help to ensure that former State employees do not exercise undue influence over their former colleagues still in State service, or utilize information on specific cases gained during government service, to benefit themselves or private clients.<sup>215</sup> They also prevent former State employees from receiving special treatment, or creating the impression in others that they enjoy special treatment, or creating the impression in others that they enjoy special treatment, when dealing with former colleagues in their official capacities.<sup>216</sup>

Public Officers Law §§ 73(8)(a)(i) and (ii) contain two types of post-employment restrictions: a two-year bar on activity before the State agency where a former State employee worked and a lifetime bar relating to certain matters in which a State employee was personally involved in an official capacity.<sup>217</sup> The two-year bar and lifetime bar apply to all former State officers

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214 See New York State Ethics Comm’n, Advisory Ops. No. 89-08 (1989); 88-01 (1988).

215 New York State Ethics Comm’n, Advisory Op. No. 88-01 (1988); *see also* New York State Joint Comm’n on Pub. Ethics, Advisory Op. No. 18-01 (2018).

216 New York State Ethics Comm’n, Advisory Op. No. 89-07 (1989), *citing* Op. Att’y Gen. No. 84-F20.

217 New York State Ethics Comm’n, Advisory Op. No. 95-19 (1995).



and employees except members of the Board of Regents of the State University of New York, members and directors of public authorities, and officers of State boards, commissions or councils, who are uncompensated or compensated on a per diem basis.<sup>218</sup> The restrictions apply regardless of how long the employee worked for the State,<sup>219</sup> or the employee's level of responsibility or exercise of discretion in their former State functions<sup>220</sup> or how long the employee worked for the State.<sup>221</sup> There is no exception for workers who were hired on a part-time or seasonal basis.<sup>222</sup>

State agencies are authorized to adopt post-employment rules that are more restrictive than those set forth in the statute.<sup>223</sup> A former State employee can always be re-hired as a State employee by any agency and perform any necessary services without violating the restrictions in Public Officers Law § 73(8).<sup>224</sup>

Public Officers Law § 73(8)(a)(iii) imposes special rules for former members of the State Legislature and former legislative employees. Specifically, no former member of the Legislature may for two years after leaving office "receive compensation for any services on behalf of any person, firm, corporation or association to *promote or oppose, directly or indirectly*, the passage of bills or resolutions by either house of the legislature."<sup>225</sup> Moreover, no legislative employee may for a period of two years after leaving employment by the Legislature "receive compensation for any services on behalf of any person, firm, corporation or association *to appear, practice or directly communicate before either house of the legislature to promote or oppose* the passage of bills or resolutions by either house of the

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218 This exclusion from the definition of "state officer or employee" for purposes of Public Officers Law § 73 is found in § 73(1)(i), (iii), and (iv).

219 New York State Ethics Comm'n, Advisory Op. No. 99-16 (1999).

220 New York State Ethics Comm'n, Advisory Op. No. 91-17 (1991).

221 New York State Ethics Comm'n, Advisory Op. No. 99-16 (1999).

222 New York State Ethics Comm'n, Advisory Op. No. 94-04 (1994). There is a narrow exception for former State employees who were employed "on a temporary basis to perform routine clerical services, mail services, data entry services or other similar ministerial tasks . . ." N.Y. Pub. Off. Law § 73(8)(f). The post-employment restrictions will not prohibit this class of former State workers from providing similar services to a State agency, as an employee of a company that is under contract with the State agency to provide such services. This narrow exception to the post-employment restrictions is rarely invoked.

223 N.Y. Pub. Off. Law § 73(8)(d); New York State Ethics Comm'n, Advisory Op. No. 97-02 (1997).

224 New York State Ethics Comm'n, Advisory Op. No. 90-21 (1990).

225 Public Officers Law § 73(8)(a)(iii) (italics added).

legislature.”<sup>226</sup> Legislative Law § 80(7)(i) empowers the Legislative Ethics Commission to offer advice and render formal advisory opinions to legislators and legislative employees on these restrictions.

## **B. Two-Year Bar**

The two-year bar restricts the ability of former State employees to leverage their connections with their former agency by generally prohibiting them from engaging in efforts to influence a decision of their former agency or to gain information from the agency that is not generally available to the public.<sup>227</sup> The nature of the subject matter involved is irrelevant when applying the two-year bar.<sup>228</sup>

Public Officers Law § 73(8)(a)(i) contains two specific types of restrictions, both of which apply for two years following one’s separation from State service. The “appear or practice” clause prohibits former State employees from appearing or practicing before their former agency. The “backroom services” clause prohibits former State employees from rendering services for compensation in relation to any case, proceeding, application, or other matter before their former agency.<sup>229</sup>

### ***1. Appearing or Practicing***

The types of prohibited activities under the appear or practice clause can be divided into “actual appearances” and appearances by submission of written documents that identify the former employee.<sup>230</sup>

Prohibited actual appearances generally involve direct interaction between the former employee and the former agency. Examples of prohibited activities under this provision include entering into a contract to provide services to a former agency;<sup>231</sup> negotiating a contract with a former agency on behalf of another party;<sup>232</sup> representing a client in an audit before a former agency;<sup>233</sup>

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226 Public Officers Law § 73(8)(a)(iii) (*italics added*).

227 New York State Joint Comm’n on Pub. Ethics, Advisory Op. No. 18-01 (2018), *citing* New York State Ethics Comm’n, Advisory Op. No. 99-17 (1999).

228 New York State Ethics Comm’n, Advisory Op. No. 90-19 (1990).

229 N.Y. Pub. Off. Law § 73(8)(a)(i).

230 *See* New York State Ethics Comm’n, Advisory Op. No. 89-08 (1989).

231 New York State Ethics Comm’n, Advisory Op. No. 89-09 (1989).

232 New York State Ethics Comm’n, Advisory Op. No. 90-04 (1990).

233 *Id.*

engaging in settlement discussions with a former agency;<sup>234</sup> contacting key agency personnel to collect data that would not normally be available to the public;<sup>235</sup> and calling the former agency to ask questions, on behalf of another person, regarding a matter that is before the agency.<sup>236</sup>

A prohibited appearance by means of written documents can occur by submitting to a former agency a grant proposal application or other written work product bearing a former employee's name.<sup>237</sup> A former State employee who creates work product bearing his name will violate the appear or practice clause if he can reasonably assume that the work product will reach his former agency.<sup>238</sup>

Since the two-year bar only reaches activities intended to influence an agency decision or action or to obtain non-public information,<sup>239</sup> not every appearance violates the law. For example, a narrow exception to the two-year bar permits an attorney who is a former State employee to represent a client in a court of competent jurisdiction in litigation in which the former employee's agency is a party. In these circumstances, the appearance is deemed to be before the court, and not before the former agency.<sup>240</sup> It has also been held that the two-year bar does not prohibit a former employee of the New York State Department of Transportation from submitting an application to that department for federal certification as a "minority business enterprise."<sup>241</sup> The agency reviews and decides New York State Minority Business Enterprise applications based on eligibility standards established by the federal government. Therefore, the reasoning goes, the State agency merely acts as an agent of the federal government by applying federal standards, and is not susceptible to undue influence when making its determination.<sup>242</sup>

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234 New York State Ethics Comm'n, Advisory Op. No. 95-28 (1995).

235 New York State Ethics Comm'n, Advisory Op. No. 04-06 (2004).

236 New York State Ethics Comm'n, Advisory Op. No. 94-05 (1994).

237 New York State Ethics Comm'n, Advisory Op. No. 90-21 (1990).

238 New York State Ethics Comm'n, Advisory Op. No. 94-06 (1994).

239 New York State Joint Comm'n on Pub. Ethics, Advisory Op. No. 18-01 (2018).

240 New York State Ethics Comm'n, Advisory Op. No. 92-22 (1992); *see also* New York State Ethics Comm'n, Advisory Op. No. 89-07 (1989). This "litigation exception" only applies to activities conducted in the presence of an adjudicator. Appearing and practicing directly before the former agency is still prohibited. Therefore, while the former employee would be permitted to argue motions in court, conduct a trial, and engage in settlement discussions in the presence of the adjudicator, the former employee would be prohibited from signing pleadings, discovery demands, or motions that are to be served on the former agency, or to conduct depositions outside the presence of an adjudicator.

241 New York State Ethics Comm'n, Advisory Op. No. 95-23 (1995).

242 *Id.*

Additionally, although submitting work product to one's former agency can constitute a prohibited appearance, not all "work product" is subject to the two-year bar. For example, the two-year bar does not prohibit a former State employee, subsequently employed as a licensed private investigator, from taking his clients' fingerprints and sending them to his former agency.<sup>243</sup> Taking the fingerprint images does not create anything original, but merely transforms the prints, which pre-exist on the fingers of an individual, into a format that can be used. Also, the agency makes no judgment based on the services of the person taking the prints; any agency decision would be based on the identifying information encoded in the prints, and the person taking the prints did not create that information.<sup>244</sup> Therefore, the act of taking the fingerprints was not an effort to influence an action or decision of the agency.<sup>245</sup>

The two-year bar ordinarily will not prevent a former State employee from applying to his former agency to renew a professional license where the agency has already performed the detailed review of the initial application, and the renewal is essentially a ministerial exercise.<sup>246</sup> It is unclear whether an initial application for a professional license would violate the two-year bar, but if the required agency review is extensive, it likely would be seen as a violation.<sup>247</sup>

The State Ethics Commission found a violation in a matter involving a former employee of the New York State Department of Motor Vehicles who submitted an initial application to the department to operate a driving school.<sup>248</sup> This action created conditions that led to inevitable violations of the two-year bar, because the application was only the first step in what would be, in effect, a continuous stream of contacts between the former employee and the agency.

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243 New York State Ethics Comm'n, Advisory Op. No. 97-15 (1997).

244 *Id.*

245 See New York State Joint Comm'n on Pub. Ethics, Advisory Op. No. 18-01 (2018).

246 New York State Ethics Comm'n, Advisory Op. No. 94-01 (1994) (two-year bar does not prohibit former State employee from submitting application to former agency for re-certification as a family care practitioner); New York State Ethics Comm'n, Advisory Op. No. 94-02 (1994) (two-year bar does not prohibit former State employee from applying for renewal of professional license: "[T]he intent of the 'revolving door' provision of the law is not to preclude one from practicing a given trade, profession or occupation . . .").

247 New York State Ethics Comm'n, Advisory Op. No. 94-02 (1994) ("[T]he Commission finds it significant that the requesting individual, prior to separating from State service, had been certified by the Department of Health as a [health professional] and that her renewal application consists largely of updating information that her former agency has already reviewed and approved, at the time of the original application.").

248 New York State Ethics Comm'n, Advisory Op. No. 98-01 (1998).

The former employee would have to apply to the department for a driving instructor's certificate, and therein seek a waiver of the requirement for a minimum number of hours of behind-the-wheel instruction; his former colleagues in the agency's district office would perform an inspection of the proposed office and instructional space; and the former employee would have to sign and submit forms for each student to certify that the student had completed a driving course. He would also make appointments with the agency and drive his students to the testing site, where the test would be given by a former member of his unit. Under these circumstances, the two-year bar prohibited the individual from proceeding with the application.<sup>249</sup>

A former State employee who works for a private sector entity but is compensated from grant funds paid by his former agency does not violate the two-year bar, so long as (1) the former agency is not required to approve his employment; (2) the former State employee's work product is not submitted to, or approved by, his former agency; (3) the funds used to pay the former State employee are not from grants with which he was directly concerned or actively considered during his State employment; and (4) the services to be performed by the former State employee are general in nature and not designed to assist any entity in dealing with specific matters before his former agency.<sup>250</sup>

## ***2. Backroom Services***

The backroom services clause of Public Officers Law § 73(a)(8)(i) prohibits a former employee from receiving compensation for rendering services to any person or entity "behind the scenes" in relation to any case, proceeding or application or other matter before the individual's former agency, even when there is no appearance.<sup>251</sup> A violation can occur even if the former agency does not know of the former employee's participation in the matter.<sup>252</sup> The statute specifically prohibits receiving compensation for providing backroom services, not the performance of backroom services. Therefore, one can provide backroom services for free without violating the two-year bar.

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<sup>249</sup> *Id.*

<sup>250</sup> New York State Ethics Comm'n, Advisory Op. No. 90-21 (1990).

<sup>251</sup> New York State Comm'n on Pub. Integrity, Advisory Op. No. 08-02 (2008).

<sup>252</sup> New York State Ethics Comm'n, Advisory Op. No. 90-07 (1990).

The backroom services clause prohibits a former State employee from accepting compensation to participate in preparing documents for submission to the individual's former agency, even if the former employee's name does not appear on the documents. Such documents can include an application to be submitted to the former employee's State agency, a plan or strategy for influencing a decision of the former employee's State agency,<sup>253</sup> or any other documents, when it is reasonably foreseeable that the documents will be reviewed by the individual's former agency. For example, a former Department of Taxation and Finance employee is prohibited from preparing State income tax returns within two years of leaving the agency, as he would be rendering compensated services on a matter before his former agency.<sup>254</sup> The prohibition on backroom services also extends to providing behind-the-scenes guidance regarding a matter that is before the agency, such as instructing or advising a colleague to place a telephone call or to mention such former employee's name in a telephone call to the individual's former agency.<sup>255</sup>

On the other hand, the backroom services clause does not prevent a former employee from applying the general knowledge and expertise acquired during State service, nor does it prohibit providing general information on a former agency's procedures and requirements, like that which would be found in a book or taught in a seminar, but such knowledge and information may not be applied to a specific case before the former agency.<sup>256</sup> The Commission has held, for example, that the backroom services clause does not prohibit a former State employee from accepting compensation to prepare informational material useful or necessary to the completion of an application by anyone, where such services do not involve specific advice or participation in the preparation of an application to be submitted to the employee's former agency.<sup>257</sup> Such general information must be unrelated to a specific matter and must include only a general explanation of law, policy, and procedures.<sup>258</sup>

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253 New York State Ethics Comm'n, Advisory Op. No. 99-17 (1999).

254 *See* In re Breen, Case No. 15-086, New York State Joint Commission on Public Ethics Enforcement Actions (Feb. 27, 2019); *see also*, New York State Ethics Comm'n, Advisory Op. No. 01-07 (2001).

255 New York State Ethics Comm'n, Advisory Op. No. 97-01 (1997).

256 New York State Ethics Comm'n, Advisory Op. No. 90-04 (1990).

257 New York State Ethics Comm'n, Advisory Op. No. 90-03 (1990).

258 *Id.*

### *3. Identifying the Former Agency for Two-Year Bar Purposes*

The two-year bar is agency-specific, because it regulates post-State activity only when it implicates a former State employee's former employing agency. Generally, it does not prohibit contact with any other State agency.

Under the two-year bar, a former agency includes all the constituent units of the agency; application of the bar is not limited to the division(s) or unit(s) within the agency to which the former employee was assigned.<sup>259</sup> However, where the employing unit is sufficiently separate from the host agency as to constitute an independent entity, an exception can be warranted. In Advisory Opinion No. 95-01, two employees of the Liquidation Bureau within the State Insurance Department (now part of the Department of Financial Services) argued that they should be deemed employees of the Liquidation Bureau only. The function of the Liquidation Bureau was to liquidate insolvent insurance carriers. There was no movement of employees between the Liquidation Bureau and the State Insurance Department. The employees of the Liquidation Bureau were not paid out of State Insurance Department funds; their compensation was fixed by the Superintendent of Insurance, subject to court approval, and paid from the assets of each company in liquidation. The civil service system did not apply and there were no State budget implications. Furthermore, the Attorney General, who would represent the State Insurance Department in court, played no role with respect to the Bureau, and the Court of Claims, which has jurisdiction to hear claims against the State Insurance Department, has no jurisdiction with regard to claims against the Liquidation Bureau, which are heard in State Supreme Court. Under these particular circumstances, the inquiring individuals were subject to the two-year bar only with respect to the Liquidation Bureau, and were not prohibited from appearing before other units within the State Insurance Department.<sup>260</sup>

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259 New York State Ethics Comm'n, Advisory Op. No. 91-06 (1991). In the context of the State University of New York, however, each campus, as well as the SUNY Central Office, is a separate agency for two-year bar purposes. New York State Ethics Comm'n, Advisory Op. No. 95-42 (1995).

260 New York State Ethics Comm'n, Advisory Op. No. 95-01 (1995); *see also* State of New York State Ethics Comm'n, Advisory Op. No. 90-18 (1990) (holding that the Division of Tax Appeals ["Division"] was an independent entity within the Department of Taxation and Finance ["Department"]. The Division had a Tax Appeals Tribunal consisting of three commissioners appointed by the Governor; the tax appeals tribunal had the power of appointment and removal of its employees, and it prepared and submitted a budget to the commissioner of the Department which could not be revised by the commissioner.)

In most cases, a former State employee will have been employed by, and will have served, a single State agency, and applying the two-year bar with respect to that agency will be clear. It is possible, however, for a former employee to have more than one former agency for two-year bar purposes.<sup>261</sup> For example, an employee who leaves one State agency and moves to another and then, within two years of the move, leaves State service, will be subject to a two-year bar with respect to both agencies; the periods covered by the two-year bars are measured from the date the former employee left each agency.<sup>262</sup>

Additionally, the nature of a State employee's official duties and responsibilities may result in applying the two-year bar to more than one agency, if the person (1) was subject to the oversight and decision making processes of a second agency; (2) actively and routinely managed significant projects or matters relating to a second agency; and/or (3) rendered sufficiently significant and regular duties to a second agency.<sup>263</sup> For example, Advisory Opinion No. 03-07 considered an inquiry from an employee of the Office of Temporary and Disability Assistance whose job duties required him to evaluate and make funding recommendations for the Homeless Housing and Assistance Program and other programs. The Homeless Housing and Assistance Program provides capital grants and loans to not-for-profit and charitable organizations to acquire, construct, or rehabilitate housing for persons who are homeless and are unable to secure adequate housing without special assistance. Since he had regular and continuing responsibilities to the Homeless Housing and Assistance Program, both the Office of Temporary Disability Assistance and the Homeless Housing and Assistance Program would be deemed the individual's former agencies for two-year bar purposes.

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261 See New York State Ethics Comm'n, Advisory Op. No. 06-05 (2006); State of New York State Ethics Comm'n, Advisory Op. No. 90-22 (1990); State of New York State Ethics Comm'n, Advisory Op. No. 90-12 (1990).

262 New York State Ethics Comm'n, Advisory Op. No. 95-19 (1995).

263 New York State Jt. Comm'n on Pub. Ethics, Advisory Op. No. 16-03 (2016). The nature of contact or interaction with a second agency is key to this analysis because, as noted in this Opinion, the potential for unfair advantage that underlies the two-year bar is predicated upon a person having had regular and significant contact or interactions with an agency. Whether a former employee was on an agency's payroll may be a factor to consider since it could relate to oversight, but that fact standing alone does not make an agency a "former agency."



The corporate structure of the Metropolitan Transportation Authority and its affiliate and subsidiary entities can present unique complications in the application of the two-year bar.<sup>264</sup> Generally, a former employee of the MTA or an MTA subsidiary or affiliate may appear before a different MTA entity without violating the two-year bar.<sup>265</sup> However, given the relationship between the MTA and its affiliated agencies, an employee may have more than one former agency within that structure, depending upon the individual's job responsibilities.<sup>266</sup> In Advisory Opinion No. 95-33, a senior staff member at the Metropolitan Transportation Authority asked whether his two-year bar would apply only to the Metropolitan Transportation Authority or if it would extend to Metropolitan Transportation Authority affiliates and subsidiaries. It was noted that the Metropolitan Transportation Authority and each of its affiliated agencies are governed by the same board of directors, so that the employees of each affiliate are ultimately responsible to the same board and final decisions are made by the same individuals. More conclusive, however, was the finding that the inquiring individual, who served in a high-ranking department head position, had regularly fulfilled duties for the Metropolitan Transportation Authority in matters that involved the affiliated agencies. Based on the functions and responsibilities of the inquiring individual, the Metropolitan Transportation Authority and all its affiliated agencies comprised his former agencies for two-year bar purposes.

Advisory Opinion No. 03-04 considered the application of the two-year bar to a former senior official of the Long Island Rail Road, a Metropolitan Transportation Authority subsidiary agency. The former official's job responsibilities related primarily to the Long Island Rail Road, but he had responsibilities to the Metropolitan Transportation Authority specifically in the areas of the All-Agency Deferred Compensation (401K and 457) Plan ("Plan") and the Excess Liability Fund ("Fund"). Since the individual had provided "continuing service" to the Metropolitan Transportation Authority on a significant and regular basis due to his responsibilities relating to the Metropolitan Transportation Authority's Plan

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264 These entities include the Long Island Rail Road, Metro North Railroad, Staten Island Rapid Transit Operating Authority, Metropolitan Suburban Bus Authority, MTA Bus Authority, MTA Capital Construction Company, Triborough Bridge and Tunnel Authority, and the New York City Transit Authority.

265 New York State Jt. Comm'n on Pub. Ethics, Advisory Op. No. 16-03 (2016).

266 *Id.*

and Fund, the Metropolitan Transportation Authority and the Long Island Rail Road were his former agencies for purposes of the two-year bar.<sup>267</sup>

Special considerations can come into play when a State employee is caused to move from one agency to another as a result of an agency reconfiguration. In Advisory Opinion No. 96-07, the inquiring individual was a former State employee who began his State service with the Medical Care Facilities Finance Agency, which was within the Housing Finance Agency. During the course of his employment, the functions of the Medical Care Facilities Finance Agency were removed from the Housing Finance Agency and merged into the Dormitory Authority of the State of New York ("Dormitory Authority"), although the Medical Care Facilities Finance Agency continued to exist as an entity.<sup>268</sup> A limited number of Housing Finance Agency employees, including the inquiring individual, were transferred to the Dormitory Authority, some of whom performed services exclusively on Medical Care Facilities Finance Agency matters, while others were integrated with Dormitory Authority staff and performed services on both Medical Care Facilities Finance Agency and Dormitory Authority matters.<sup>269</sup>

The purpose of the Medical Care Facilities Finance Agency was to provide funds, through the issuance of bonds, for the construction and improvement of certain health and health-related facilities. The Dormitory Authority, even before the merger, had broad authority to issue bonds for the construction and improvement of educational facilities in the State, and to issue bonds to support certain hospitals and health facilities enumerated in its governing statute.<sup>270</sup>

The traditional two-year bar analysis was not suitable based on these facts. If the former employee's bar only applied to the Medical Care Facilities Finance Agency, he, unlike other former State employees, would be free to deal with his former colleagues, who are now Dormitory Authority employees. If his bar were to apply to the entire Dormitory Authority as successor to the Medical Care Facilities Finance Agency, he would be unfairly prohibited from working

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267 New York State Ethics Comm'n, Advisory Op. No. 03-04 (2003). The official had been placed on the LIRR payroll "for pension considerations," but there is no indication that this was a factor in the final decision. Advisory Opinion No. 16-03 concluded that whether a former employee was on an agency's payroll may be a factor to consider since it could relate to oversight, but that fact, standing alone, does not make an agency a "former agency."

268 New York State Ethics Comm'n, Advisory Op. No. 96-07 (1996).

269 *Id.*

270 *Id.*

with employees in an agency different from his former agency on matters unrelated to his prior work. Thus, the customary analysis, defining the two-year bar by agency, would not achieve a fair result. The State Ethics Commission determined that under these unique circumstances, the two-year bar would be defined by function rather than agency, because there was no alternate approach that led to an equitable result.

There was substantial overlap of the functions of the Medical Care Facilities Finance Agency and the functions of the Dormitory Authority. The Medical Care Facilities Finance Agency was empowered to finance the construction of health and mental health facilities, while the Dormitory Authority was empowered to finance the construction of those health and mental health facilities specifically mentioned in its governing statute, of which there were about one hundred. It was decided that the purpose of the two-year bar would best be effectuated by barring the former employee from involvement with any facility that might have been financed by the Medical Care Facilities Finance Agency prior to the consolidation. Accordingly, the former employee could not appear, practice, or render services for compensation in relation to any matter before the Dormitory Authority if that matter was within the authority of the Medical Care Facilities Finance Agency prior to its merger with the Dormitory Authority. This would preclude him from using his inside knowledge and contacts which would not be available to others. Although it would allow him to work on the financing of other projects that come before the Dormitory Authority, and thus appear before some of the same individuals with whom he worked while at the Medical Care Facilities Finance Agency, the subject matter of the projects would be different from those on which he worked when he was in State service, so he would not have special knowledge unavailable to the public.<sup>271</sup>

The functional approach was also used in Advisory Opinion No. 97-01, where the former State employee had begun his state employment in the Division of Health and Long Term Care ("Division of Health") within the New York State Department of Social Services ("Department of Social Services").<sup>272</sup> During the course of his employment, the functions and employees of the Division of Health were transferred to the New York State Department of Health, where the unit was renamed the Office of Medicaid Management.

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271 *Id.*

272 New York State Ethics Comm'n, Advisory Op. No. 97-01 (1997).

The individual asked how the two-year bar would apply under those circumstances. These facts could be distinguished from those in Advisory Opinion No. 96-07 because that case involved the merger of a unit into another agency, whereas Advisory Opinion No. 97-01 involved the transfer of a function to another agency. However, the functional analysis approach was still appropriate because the potential consequences were the same: if the former employee was restricted only from appearing or rendering services on matters before the Department of Social Services, he would be free to appear before his former colleagues who were now employed by the New York State Department of Health. Conversely, extending the bar to the entire Department of Health on the theory that his former colleagues are now employed by that agency would be far too restrictive. Accordingly, under the functional approach, the two-year bar for the inquiring individual was applied to all of the Department of Social Services as the agency in which the individual previously worked, and the unit of the Department of Health that had assumed the responsibility for the Medicaid program. Therefore, the two-year bar precluded the former employee from appearing, practicing, or rendering services for compensation on a matter before the Department of Social Services or the Office of Medicaid Management in the New York State Department of Health for two years after his or her separation from State service, but it did not apply with respect to any other unit within the Department of Health.<sup>273</sup>

### C. Lifetime Bar

The lifetime bar in Public Officers Law § 73(8)(a)(ii) prohibits a former State employee from appearing, practicing, communicating, or otherwise rendering services in relation to any case, proceeding, application, or transaction in which the former employee was directly concerned and he or she personally participated, or which was under his or her active consideration, while in State service.<sup>274</sup> If the matter is before a State agency, the prohibition is complete. If the matter is before any other entity, the lifetime bar prevents the former State employee from

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273 *Id.*; As noted, *supra*, when a state employee elects to change jobs from one agency to another, the two-year bar periods are measured from the date the former employee left each agency. *See* New York State Ethics Comm'n, Advisory Op. No. 95-19 (1995). As seen here, however, when the change in agencies results from an administrative restructuring, the two-year bar period for both State entities runs from the date the employee leaves State service.

274 N.Y. Pub. Off. Law § 73(8)(a)(ii).

being compensated for rendering services in relation to the matter.<sup>275</sup> Therefore, a former State employee may provide services to a person or entity on such a matter on a voluntary, unpaid basis without violating the lifetime bar.

The main questions in a lifetime bar analysis are (1) whether the matter at issue constitutes the same “case, proceeding, application or transaction” in which the individual was involved as a State employee; and (2) whether the individual’s involvement in a matter as a State employee rose to the level of personal participation and direct concern, or active consideration in the matter. The subjective nature of these questions means that the lifetime bar must be applied on a case-by-case basis, and the determinations are highly dependent on the specific facts presented.<sup>276</sup>

### ***1. Case, Proceeding, Application, or Transaction***

The lifetime bar only applies to a *specific* case, proceeding, application, or transaction. It does not prohibit a former State employee from providing general facts or knowledge gained while employed by his former agency, including general facts on past transactions or facts relating to transactions about which he possessed a mere acquaintance.<sup>277</sup> A former State employee’s understanding of his former agency’s general policies and procedures is considered to be general knowledge.<sup>278</sup> The lifetime bar does not prohibit a former State employee from providing general information concerning the requirements of his former agency with respect to certification or funding, as long as the general information is unrelated to any specific case and involves only a general explanation of law, policy, and procedures.<sup>279</sup> Moreover, the lifetime bar does not prohibit a former State employee from utilizing his knowledge of past policies and procedures to provide advice on a new transaction.<sup>280</sup>

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275 See New York State Comm’n on Pub. Integrity, Advisory Op. No. 11-03 (2011); New York State Ethics Comm’n, Advisory Op. No. 95-19 (1995); New York State Ethics Comm’n, Advisory Op. No. 95-16 (1995); New York State Ethics Comm’n, Advisory Op. No. 95-15 (1995); New York State Ethics Comm’n, Advisory Op. No. 95-07 (1995); New York State Ethics Comm’n, Advisory Op. No. 94-18 (1994); New York State Ethics Comm’n, Advisory Op. No. 93-11 (1993).

276 New York State Ethics Comm’n, Advisory Op. No. 90-19 (1990).

277 See New York State Ethics Comm’n, Advisory Op. No. 91-18 (1991); State of New York State Ethics Comm’n, Advisory Op. No. 90-16 (1990).

278 New York State Ethics Comm’n, Advisory Op. No. 91-02 (1991).

279 New York State Ethics Comm’n, Advisory Op. No. 90-04 (1990).

280 *Id.*

In many cases, the two matters under review are clearly so related as to constitute parts of the same transaction. For example, the lifetime bar prohibits a former employee of the State Energy Office from representing a private entity in a Public Service Commission proceeding in which he previously personally participated while in State service.<sup>281</sup> Bills introduced in the same or even in different legislative sessions generally will constitute the same transaction when they affect the same or substantially the same population and issues.<sup>282</sup> Similarly, the lifetime bar prohibits a former State employee who worked on proposed legislation from participating in rulemaking and ratesetting related to the legislation, because regulations are inextricably connected to the enabling legislation they seek to effectuate.<sup>283</sup>

Based on the statutory language, early precedent of the State Ethics Commission had suggested that the scope of prohibited activities under the bar was intended to be narrow:

Comparing the language of the lifetime bar with the two-year bar . . . the Commission notes that the two-year bar precludes certain services “in relation to any case, proceeding or application or *other matter*”; the lifetime bar speaks to “case, proceeding, application or *transaction*.” It seems clear that the two-year bar, which is absolute with respect to a former employee’s former State agency, was meant to prohibit the widest possible scope of activities. The lifetime bar, which applies to the prohibited activities before all State agencies, is narrower in scope. The prohibited acts are very specific.<sup>284</sup>

However, subsequent precedent, particularly in the context of “projects”—endeavors that are large, multifaceted, and tend to continue for an extended time—tended toward expanding the scope of activities prohibited under the lifetime bar. For example, a former State employee was found to be lifetime

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281 New York State Ethics Comm’n, Advisory Op. No. 95-11 (1995). The fact that the PSC changed the case number during the proceeding did not create a new matter, as the record from the first proceeding was incorporated into the second.

282 New York State Ethics Comm’n, Advisory Op. No. 91-20 (1992).

283 New York State Ethics Comm’n, Advisory Op. No. 93-02 (1992), *cf.* New York State Ethics Comm’n, Advisory Op. No. 93-13 (1993) (lifetime bar held not to prohibit former State employee from assisting entities in obtaining funding from the federal government under the law for which he lobbied, on behalf of the State, while in State service because “seeking of grant money under the law is a different transaction from the lobbying of the law.”).

284 New York State Ethics Comm’n, Advisory Op. No. 91-02 (*italics and underlining added*).

barred from working on a multi-stage highway construction project because he had worked on a phase of the project ten years earlier, notwithstanding intervening changes in the design of the project.<sup>285</sup> Several Opinions have held that the lifetime bar prohibited former State employees from any activity related to large projects in which they had played limited roles, regardless of the passage of time and without any examination of the specific activities engaged in by the former State employee.<sup>286</sup>

In Advisory Opinion No. 18-01, the Joint Commission on Public Ethics sought to recalibrate the application of the lifetime bar in line with its original scope. As the Opinion noted:

A large infrastructure construction project is not necessarily a single transaction for lifetime bar purposes. For example, a State employee who participated in a ground-level environmental study on a project need not automatically be barred for life from participating with a private contractor, years later, in inspection work on the same “project” absent a showing of “both personal participation and direct concern or active consideration” with respect to the inspection work. The lifetime bar demands greater specificity.<sup>287</sup>

The Opinion set forth a nonexclusive list of specific factors to consider when determining whether a project or other matter is truly “in relation” to a prior activity of the State employee: (1) the general nature of the project; (2) the phases of the project involved; (3) the nature of the work performed as a State employee and the nature of the work projected to be performed; (4) the extent to which the projected work constitutes a continuation of the earlier work; (5) the identities of other persons and/or entities directly involved in the earlier work and in the projected work; and (6) intervening changes in design, methods, or technology.<sup>288</sup> Going forward, this framework will assist in determining whether the lifetime bar will apply in specific instances.

## ***2. Direct Concern and Personal Participation, or Active Consideration***

A former State employee’s mere acquaintance with a matter will not trigger the lifetime bar, and application of the lifetime bar requires more

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<sup>285</sup> New York State Ethics Comm’n, Advisory Op. No. 97-09 (1997).

<sup>286</sup> See New York State Ethics Comm’n, Advisory Ops. No. 97-09 (1997), 95-06 (1995), 91-12 (1991).

<sup>287</sup> New York State Jt. Comm’n on Pub. Ethics, Advisory Op. No. 18-01 (2018).

<sup>288</sup> *Id.*

than an awareness of, or informal conversation concerning, the circumstances underlying a matter.<sup>289</sup> Rather, the facts must clearly show personal participation and direct concern, or active consideration.<sup>290</sup> For example, merely lobbying Congress on a bill supported by the State does not rise to the level of personal participation and direct concern in the development of the resulting law, because the final version of the legislation was entirely up to Congress.<sup>291</sup> Although the employee may have had knowledge of the process leading to the development of the proposed legislation, the employee's role was to advocate one result over another, and the decisions were others' to make.<sup>292</sup>

In Advisory Opinion No. 95-41, a former Chief of the Environmental Crimes Unit in the Office of the Attorney General entered private practice, where he undertook representing a defendant in a civil environmental proceeding in federal court. When the former Chief was working in the Office of the Attorney General, the same defendant had been the subject of an indictment issued by the Office of the Attorney General. As Chief of the Environmental Crimes Unit, he supervised all criminal environmental cases brought by the Office of the Attorney General, and approved decisions as to whether to present environmental cases to grand juries and to issue indictments. It appeared that, with respect to this particular defendant, the former employee had been consulted before the empaneling of the grand jury, and he had reviewed and edited the indictment before it was issued, but that was the extent of his involvement.<sup>293</sup>

It was determined that the individual's involvement in the criminal case was, at most, tangential, as any discussions in which he was involved were brief and did not delve into substantive details. His limited involvement was not such that he personally participated in and was directly concerned with the matter, or that he had it under his active consideration, and, therefore, the lifetime bar did not preclude him from representing a party in the civil action.<sup>294</sup>

An issue implicating the lifetime bar may arise when the former head of a State agency wishes to engage in a matter in which he was not directly involved as a State employee, but which was under the direct concern and participation,

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289 New York State Ethics Comm'n, Advisory Op. No. 89-03 (1989).

290 New York State Ethics Comm'n, Advisory Op. No. 89-03 (1989).

291 New York State Ethics Comm'n, Advisory Op. No. 93-13 (1993).

292 *Id.*

293 New York State Ethics Comm'n, Advisory Op. No. 95-41 (1995).

294 *Id.*



or active consideration, of the former agency head's senior staff. Advisory Opinion No. 92-20 considered an inquiry from the former head of a State agency who, after leaving State service, had been engaged to perform lobbying activities relating to, *inter alia*, pending legislation involving pension calculations. The individual involved stated that as agency head, he had directed his staff to assist in drafting the proposed legislation, and the agency's general counsel was directly concerned with and personally participated in the matter by preparing the agency's position on the legislation and drafting memoranda discussing the issue for the Counsel to the Governor.<sup>295</sup>

The facts did not establish that the former agency head was directly concerned with and personally participated in the preparation of the legislation, nor was it under his active consideration. However, for purposes of the lifetime bar, a principal-agent analysis imputed such involvement to the agency head based on the actions of his senior staff, and found that the lifetime bar prohibited the former agency head's involvement in matters relating to the pending pension legislation.<sup>296</sup>

The Advisory Opinion noted that there was a "hazard" in imputing actions of staff to a supervisor for purposes of determining whether there has been a violation of the ethics law, but in reaching this conclusion, the State Ethics Commission considered (1) the principal here was the head of the agency; (2) the very senior level of the agent (general counsel) who had acted on behalf of the agency head; (3) the action was on a matter of considerable fiscal impact; and (4) the communications in question were directed to the Counsel to the Governor. Had the earlier matter involved mere ministerial or inconsequential acts undertaken by lower level staff separated from the principal by many layers of organization, the State Ethics Commission's conclusion might well have been different.<sup>297</sup>

#### **D. Executive Chamber**

Former officers and employees of the Executive Chamber (the Governor's office) are subject to the post-employment provisions discussed above,<sup>298</sup> as well as an extension of the two-year bar which is set forth in Public Officers Law §

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295 New York State Ethics Comm'n, Advisory Op. No. 92-20 (1992).

296 *Id.*

297 *Id.*

298 Officers and employees in the Executive Chamber are subject to the requirements of Public Officers Law § 73 because they are included within the definition of "state officer or employee" for purposes of the statute. See N.Y. Pub. Off. Law § 73(1)(i)(ii).

73(8)(a)(iv).<sup>299</sup> Pursuant to Public Officers Law §§ 73(8)(a)(i) and (iv), former employees of the Executive Chamber are prohibited, for two years following their separation from such service, from appearing or practicing not only before the Executive Chamber but before *every* State agency. Backroom services for compensation are prohibited in relation to matters before the Executive Chamber, while backroom services in relation to matters before other State agencies or entities are permitted, regardless of compensation.<sup>300</sup> The lifetime bar applies to employees of the Executive Chamber in the same way as it applies to other State employees.<sup>301</sup>

### **E. Applying for Private Sector Employment**

Advisory Opinion No. 06-01 discussed the difficult ethical issues for State employees that can arise in the context of post-government employment negotiations and offers.<sup>302</sup> Indeed, under certain circumstances, the promise of future employment will constitute a prohibited gift to a State employee pursuant to Public Officers Law § 73(5) (as discussed in an earlier chapter), which can give rise to an actual or apparent conflict of interest. While mindful that State employees should be able to pursue employment opportunities outside of State government, the State Ethics Commission sought to protect the integrity of the government decision-making process, which may be jeopardized when a State employee has official responsibilities in connection with a non-governmental entity and is seeking or negotiating for employment with that entity.<sup>303</sup>

As a result, a State employee is prohibited from soliciting employment, or engaging in any post-government employment-related communications, with any individual or entity that has a specific proceeding, application, or other matter pending before him. This prohibition lasts until thirty days after the employee's involvement with the matter has ended, either because the matter was closed or decided, or the employee has recused himself or been re-assigned. This rule prevents the appearance that such a job offer could be a reward or inducement for official action.<sup>304</sup>

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299 Public Officers Law § 73(8)(a)(i) reads as follows: "No person who has served as an officer or employee in the executive chamber of the governor shall within a period of two years after termination of such service appear or practice before any state agency."

300 New York State Comm'n on Pub. Integrity, Advisory Op. No. 11-03 (2011).

301 *See, e.g.*, New York State Ethics Comm'n, Advisory Op. No. 93-02 (1993).

302 New York State Ethics Comm'n, Advisory Op. No. 06-01 (2006).

303 *Id.*

304 *Id.*

A State employee who receives an unsolicited post-government employment-related communication from an entity or individual with a pending matter before him must either (a) not pursue the opportunity; or (b) recuse himself from the pending matter, abstain from any further official contact with the entity or individual, and wait until thirty days have passed after such recusal to enter into post-government employment-related communications with the entity or individual. Additionally, the State employee must promptly notify his or her supervisors and agency ethics officer of any such job-related communication, regardless of whether he or she intends to pursue the opportunity.<sup>305</sup>

## **F. Government-to-Government Exception**

Public Officers Law § 73(8)(e) creates an exception to the post-employment restrictions in the Public Officers Law for a former State employee who is acting in his official capacity as an elected official or employee of a governmental entity.<sup>306</sup> Accordingly, the two-year and lifetime bars do not apply where a State employee who has transferred employment from one State agency to another agency; or terminated employment with a State agency and taken employment with the legislative or judicial branch of the State or the Federal government, or with any municipal government, as long as he is acting within the proper discharge of his official duties.<sup>307</sup> The exception does not apply to a former State employee who is retained as a consultant or representative of a governmental entity.<sup>308</sup>

Advisory Opinion No. 89-05 first addressed the application of the post-employment restrictions to a former State employee who would be employed by another government entity. At that time there was no statutory government-to-government exception, but the restrictions were not applied based upon policy considerations:

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305 *Id.*

306 N.Y. Pub. Off. Law § 73(8)(e).

307 *See* State of New York State Ethics Comm'n, Advisory Op. No. 89-05 (1989) (although this opinion was issued prior to the enactment of the statutory government-to-government exception, the State Ethics Commission later noted in Advisory Opinion No. 90-23 that Public Officers Law § 73(8)(e) had "incorporate[ed] the determination contained in our prior Advisory Opinion which came to the same conclusion.").

308 *See* State of New York State Ethics Comm'n, Advisory Op. No. 89-07 (1989); *see also* New York State Ethics Comm'n, Advisory Op. No. 96-01 (1996) (government-to-government exception held inapplicable to former New York State Department of Environmental Conservation employees who want to serve as mediators appointed by a Federal court because the arrangement between the court and the mediator has the attributes of a consultant agreement and not an employment relationship.)

[I]n the matter currently before the Commission, the individual intends to transfer his employment from State government to municipal government. In both situations, the “client” is the same: the public-at-large. There would be no benefit to the public if a former State employee, serving the citizens of this State in another public employment capacity, as a local government employee, were precluded from appearing or practicing before his or her former State agency. The “evil” to be avoided—the misuse of knowledge and contacts to the benefit of a private client—would not be a possibility in the case now before us. Application of § 73(8) is triggered when a State officer or employee leaves State (or “public” service), and joins the non-governmental (or “private”) sector.

Shortly after the issuance of this advisory opinion, in July 1989, the Public Officers Law was amended to codify the government-to-government exception.<sup>309</sup>

Occasionally a question arises as to whether an entity qualifies as an arm of a “federal, state or local government or one of its agencies” such that the government-to-government exception applies to the entity. For example, it has been held that a school district is a local government agency because, *inter alia*, a school district is defined as a “public entity” under § 18 of the Public Officers Law,<sup>310</sup> and that a regional planning board is a government entity, based on an opinion of the State Comptroller which held that a member of a regional planning board is a “public officer” because, under the General Municipal Law, he exercises “sovereign power.”<sup>311</sup> The issue of sovereign power is often considered when examining the application of the government-to-government exception.

For example, the New England Interstate Water Pollution Control Commission, an organization established by an interstate compact, is a government entity for purposes of Public Officers Law § 73(8)(e).<sup>312</sup> Under the compact, the New England Interstate Water Pollution Control Commission is “a body corporate and politic, having the powers, duties and jurisdiction herein

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309 See *supra* note 307.

310 New York State Ethics Comm’n, Advisory Op. No. 90-23 (1990).

311 New York State Ethics Comm’n, Advisory Op. No. 94-08 (1994).

312 New York State Ethics Comm’n, Advisory Op. No. 96-16 (1996).

enumerated and such other and additional powers as shall be conferred upon it by the act or acts of a signatory state concurred in by the others.” By statute the five commissioners representing the State of New York were the Department of Environmental Conservation Commissioner, an officer of the Department of Environmental Conservation, and such persons “as the Governor shall determine will serve the best interests of the State.”<sup>313</sup> The New England Interstate Water Pollution Control Commission was subject to regulation and audit by the Federal government but, more importantly, the New England Interstate Water Pollution Control Commission exercised sovereign power by imposing classifications of interstate waterways upon the signatory states, whereupon the member states were mandated to meet the standards required by such classifications. Accordingly, the government-to-government exception was found to apply to employees of the New England Interstate Water Pollution Control Commission, and a former employee of the Department of Environmental Conservation could accept employment with the New England Interstate Water Pollution Control Commission and appear before his former agency without violating the two-year bar.<sup>314</sup>

In contrast, the New York State Association of Counties (“NYS Association of Counties”), a not-for-profit corporation comprised of county governments and the City of New York, was not a government entity and did not qualify for the government-to-government exception.<sup>315</sup> New York County Law § 232 recognized the NYS Association of Counties as one of several associations dedicated to “the promotion of better county government,” but it was determined that the NYS Association of Counties was not a government entity because the Legislature had not granted it the authority to exercise sovereign power. As a not-for-profit association whose membership represents the interests of counties and the City of New York, its mission was not to carry out governmental functions or to serve the “public-at-large,” but to represent the interests of its members—officials of local government. Therefore, a former employee of a State agency who accepted employment with the NYS Association of Counties would be fully subject to the post-employment restrictions in the Public Officers Law.<sup>316</sup>

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313 N. Y. Env'tl. Conserv. Law § 21-0103.

314 *Id.*

315 New York State Ethics Comm'n, Advisory Op. No. 96-15 (1996).

316 *Id.*

Notwithstanding the focus on the exercise of sovereign power, a more flexible analytical approach was used in a matter relating to the I-95 Corridor Coalition, a voluntary, unincorporated association of the departments of transportation of thirteen states and the District of Columbia, and thirteen public authorities, including the New York State Thruway Authority. The purpose of the Coalition was to find solutions to shared transportation problems and challenges, and it received federal funding to support its projects and programs. The Coalition existed through the goodwill of the member states—it did not possess status as a legal entity, and it did not exercise sovereign power. Nevertheless, while holding that “no one factor” was decisive, the Coalition was found to be a government entity for purposes of the government-to-government exception, because, among other things, its role in receiving federal funding for support of its projects and programs. The Coalition did “no more than what each of its governmental members could do acting separately [and] [b]y serving as a vehicle whereby these members can coordinate their efforts, it makes them more efficient.”<sup>317</sup>

This advisory opinion was driven by the same considerations of policy which formed the basis of the government-to-government exception initially. Notably, the opinion is explicitly styled as an exception to the general rule that a government entity must exercise some sovereign power, and it also concludes that the Coalition was a “public ‘entity’” rather than “a federal, state or local government or one of its agencies.”<sup>318</sup> This suggests considerable leeway in applying the government-to-government exception, with the aim to promote public service and encourage constructive cooperative efforts in government.

### **G. Closely Affiliated Corporations**

Several State agencies have established not-for-profit corporations which function as “closely affiliated” research arms of the agencies. New York State Finance Law § 53-a(5)(d) identifies specific entities recognized as closely affiliated entities whose “purposes are essentially to support, supplement or extend the function and programs of such state agencies,” but it defines closely

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317 New York State Ethics Comm’n, Advisory Op. No. 98-17 (1998).

318 *Id.*

affiliated entities as state agencies only for purposes of the Finance Law.<sup>319</sup> The closely affiliated entities are not state agencies for purposes of Public Officers Law § 73, but since a statutory amendment in 2007, their employees have been subject to Public Officers Law § 74.<sup>320</sup>

Although the employees of the closely affiliated entities are permitted to participate in the State retirement system and elect to receive State health insurance,<sup>321</sup> the State Ethics Commission held, before the aforementioned amendments to Public Officers Law § 74, that they were not State agencies, and their employees were not State employees.<sup>322</sup> Therefore, using a traditional analysis, the State Ethics Commission did not apply the government-to-government exception to a former State employee who moved to one of the closely affiliated entities.

Nevertheless, in response to an inquiry from an employee of the Office for People with Developmental Disabilities,<sup>323</sup> the State Ethics Commission concluded that the post-employment restrictions did not apply to an employee who transferred to the agency's own closely affiliated research arm, Research Foundation for Mental Hygiene, Inc.<sup>324</sup> The State Ethics Commission found that State law recognizes a special relationship between a State agency and its closely affiliated corporation by permitting the employees of the closely affiliated entities to participate in the State retirement system and elect to receive State health insurance. Therefore, to avoid applying the post-employment restrictions, the State Ethics Commission declared that employees of a closely affiliated entity were "employees under the jurisdiction of the State agency involved."<sup>325</sup> The purposes of the post-employment restrictions were not frustrated under this interpretation because:

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319 The closely affiliated research entities include Youth Research, Inc. and Welfare Research, Inc. (affiliated with the Office for Children and Family Services); the Research Foundation for Mental Hygiene, Inc. (affiliated with the Office for People with Developmental Disabilities); Health Research, Inc. (affiliated with the Department of Health); and Research Foundation of the State University of New York.

320 See N.Y. Pub. Off. Law §§ 73(1)(g), 74(1).

321 New York State Ethics Comm'n, Advisory Op. No. 95-02 (1995).

322 *Id.*; New York State Ethics Comm'n, Advisory Op. No. 93-03 (1993); New York State Ethics Comm'n, Advisory Op. No. 91-20 (1991).

323 At the time of inquiry, the name of the agency was the Office for People With Mental Retardation and Developmental Disabilities. The current name of the agency was adopted in 2010.

324 New York State Ethics Comm'n, Advisory Op. No. 95-02 (1995).

325 *Id.*

[w]hen an employee transfers to a State agency's closely affiliated research arm, he or she will not secure unwarranted privileges. Since the interests of the agency and its research arm are similar, the employee's skill and knowledge will continue to be used to benefit the agency. Thus, the purposes of § 73(8) are met without imposing any restrictions.<sup>326</sup>

In Advisory Opinion No. 95-17, the State Ethics Commission addressed an inquiry from a former employee of the New York State Department of Social Services who proposed to accept employment with the State University of New York Research Foundation ("Research Foundation") under contracts between the State University of New York, the Research Foundation, and the Department of Social Services. In this arrangement, the individual would continue to work on matters for the Department of Social Services while employed by the Research Foundation, which would run afoul of the post-employment restrictions if they applied.<sup>327</sup> The State Ethics Commission was concerned that the former State employee would be working for a closely affiliated entity outside the "special relationship" between the employee's former agency and its own closely affiliated research arm. Moreover, he would do so without the ethical restraints that would apply to a State employee because, at the time Advisory Opinion 95-17 was issued, Public Officers Law § 74 did not apply to employees of the closely affiliated entities. The State Ethics Commission concluded that the post-employment restrictions do apply when a former State employee proposes to work for an entity that is closely affiliated with a State agency *other than* his own former agency.<sup>328</sup>

However, JCOPE revisited this issue in Advisory Opinion 17-01 upon an inquiry from a Department of Health employee who proposed to accept employment with the Research Foundation for Mental Hygiene, a closely affiliated entity of the Office of People With Developmental Disabilities, a move from his own agency to another agency's closely affiliated research arm that would have been prohibited under Advisory Opinion 95-17.<sup>329</sup> JCOPE reversed Advisory Opinion 95-17 and held that the post-employment restrictions did not

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326 *Id.*

327 New York State Ethics Comm'n, Advisory Op. 95-17 (1995) (reversed by New York State Joint Comm'n on Pub. Ethics Advisory Opinion No. 17-01 (2017)).

328 *Id.*

329 *Id.*



apply to a former State employee who accepted employment with any of the statutory closely affiliated entities. The Opinion noted that a former State employee who moves to any of the closely affiliated entities would be working in the interests of the agency which created it, and, therefore, by extension, in the interests of the public. Most persuasive to JCOPE was the amendment of Public Officers Law § 74(1) in 2007 which expanded the definition of a “state agency” to include those corporations closely affiliated with a specific State agency as set forth in New York State Finance Law § 53-a(5)(d). Thus, the employees of those closely affiliated entities are subject to the same Code of Ethics as State employees and are bound to serve the public interest; this ameliorated the concerns expressed by JCOPE’s predecessor in Advisory Opinion 95-17.

## H. Students

The policy considerations underlying the post-employment restrictions have “limited relevance” in the context of employees who are also full-time students because students typically “do not form the same type of long-term or even short-term contacts and associations that . . . employees employed on a regular basis develop. Students are generally employed . . . for the purpose of financially supporting their education or pursuing practical experience in an area under study.”<sup>330</sup> Nevertheless, there is no statutory exception from the post-employment restrictions for State employees who are also full-time students.

In Advisory Opinion No. 91-01, the State Ethics Commission discussed the distinction between individuals who “are primarily ‘students’ and their employment by the State is secondary,” and State employees whose enrollment in an academic program is tangential to their State service, and thus “are primarily ‘state employees’ and secondarily ‘students.’” The State Ethics Commission was convinced that the post-employment restrictions were “not intended to apply to individuals who were primarily students . . . and secondarily served in certain capacities with the State.” The State Ethics Commission crafted four criteria, all of which had to be met for exempting an individual as a student from the post-employment restrictions. The person:

- (1) Must be enrolled as a full-time student in an accredited course of study or on a seasonal recess therefrom;

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330 New York State Ethics Comm’n, Advisory Op. No. 91-01 (1991).

- (2) Cannot work half-time or more per week during the school year;
- (3) Can work full-time during the summer or other similar semester breaks, but is limited to 120 days (four months) of full-time service for the State during the summer vacation period; and,
- (4) Cannot receive any State employee benefits, such as medical, retirement, or vacation benefits, or have any right to re-employment.<sup>331</sup>

Advisory Opinion No. 91-01 did not allow for flexibility or the exercise of discretion in applying these criteria and, in practice, their strict application sometimes failed to honor the spirit and intent of that Opinion. For example, a full-time college student whose internship with a State agency fulfilled a requirement of his educational program would nevertheless be denied student status if the internship occasionally extended to half-time or more during the academic year because, under those circumstances, the second criterion in Advisory Opinion No. 91-01 could not be satisfied. This result was mandated by Advisory Opinion No. 91-01 even where, to all appearances, the State employment was clearly secondary to the educational undertaking.

Advisory Opinion No. 17-03 revisited Advisory Opinion No. 91-01, and concluded that the test for determining student status should be modified to permit “a reasonably flexible application of the criteria” outlined in the earlier Opinion.<sup>332</sup> Advisory Opinion No. 17-03 also allows for considering additional factors including, but not limited to, whether the individual’s State service earned course credits or otherwise satisfied an educational requirement, and whether the State position was specifically designed to be filled by students.<sup>333</sup>

## **I. “Volunteer” State Employee**

Advisory Opinion No. 10-02 considered an inquiry from the New York State Department of Environmental Conservation concerning two attorneys who had provided uncompensated services to gain experience in the field of environmental law. Both attorneys had expressed an interest in being hired for positions in the private sector that would involve representing parties before the Department, and the agency sought a finding that the volunteer attorneys were

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331 *Id.*

332 New York State Joint Comm’n on Pub. Ethics, Advisory Op. No. 17-03 (2017).

333 *Id.*

not subject to the post-employment restrictions.<sup>334</sup> The two attorneys reported to supervisory attorneys who gave them assignments, reviewed their work, and had the power to direct and control the attorneys' work. It was determined that the volunteer attorneys were functioning in roles that were substantially the same as other State employees, and thus were State employees for purposes of Public Officers Law § 73.<sup>335</sup> This holding was based, in significant part, on the fact that the two attorneys were volunteering to provide services to the New York State Department of Environmental Conservation in order to gain experience and expertise that would ultimately benefit the attorneys themselves.

## **J. Public Officers Law § 73(8-b) Exemption**

The post-employment restrictions limit what a former State employee may do with the experience and contacts gained from the State service, but they can also have the effect of limiting the State's access to the knowledge and expertise of former employees who are subject to the post-employment restrictions. Public Officers Law § 73(8-b) provides a safety valve of sorts for a State agency that believes it has a compelling need to contract for the services of a former State employee who would otherwise be prohibited by the two-year or lifetime bars from entering into such a contract.

Under § 73(8-b), the head of a State agency may apply to JCOPE for approval to contract with a former State employee by certifying, in writing, that the former employee has "expertise, knowledge or experience with respect to a particular matter which meets the needs of the agency and is otherwise unavailable at a comparable cost."<sup>336</sup> This will usually require demonstrating that the agency has been unable to find an alternative candidate at a comparable cost despite diligent efforts to do so. This is a high standard, and § 73(8-b) requests are not routine, although JCOPE receives approximately eight to ten such requests per year. Such requests must be approved by a majority vote of the JCOPE Commissioners.

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334 New York State Comm'n on Pub. Integrity, Advisory Op. No. 10-02 (2010).

335 *Id.*; The Commission on Public Integrity noted that, pursuant to Public Officers Law § 73(1)(i), the only exception from the definition of "state officer or employee" for persons who receive no compensation relates to "officers of such boards, commissions or councils who receive no compensation . . . ." Citing principles of statutory construction, the Commission on Public Integrity concluded that those who serve without compensation in State departments, bureaus, divisions or other State agencies are included within the definition of State officers and employees for purposes of § 73.

336 N.Y. Pub. Off. Law § 73(8-b).

## **K. Volunteer Work for the Benefit of the State after Leaving State Service**

Any departing State employee will take with him a body of knowledge or information, some of which may be necessary or useful to the agency but not be known to anyone still working there. As long as no compensation is offered, the two-year and lifetime bars do not prevent a former State employee from responding to a request from his former agency for information relating to a matter in which the employee was involved during his State service.

This issue was first examined in the context of the lifetime bar, “Where the State agency seeks certain information from a former officer or employee about his acts as an officer or employee, and no compensation is provided, we would not find such communication to be barred under the lifetime bar provision—because the agency seeks such information solely for its use and not for any other advantage.”<sup>337</sup> Subsequently, this holding extended to the two-year bar, that it too does not preclude State agencies “from speaking with former employees within two years of termination from State service on matters within that former employee’s knowledge, so long as that communication is not compensated.”<sup>338</sup>

Further, service as a “volunteer” on a State board, commission, or council by a former employee, at the request of the individual’s former agency, would not violate the two-year or lifetime bar.<sup>339</sup> A contrary ruling would be against the State’s interest because the State would lose the valuable services of former State officers and employees with talents and willingness to continue in some aspect of public service. “[U]npaid service performed at the request of the State and for the benefit of the State should not be construed as an appearance before a State agency.”<sup>340</sup>

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337 New York State Ethics Comm’n, Advisory Op. No. 92-01 (1992).

338 New York State Ethics Comm’n, Advisory Op. No. 93-11 (1993).

339 New York State Ethics Comm’n, Advisory Op. No. 93-13 (1993).

340 *Id.*

## ANNUAL FINANCIAL DISCLOSURE STATEMENTS

### A. Introduction

New York State has required certain public officials and employees to file an annual financial disclosure statement since 1987, when the State Legislature passed the Ethics in Government Act.<sup>341</sup> That act created Public Officers Law § 73-a, the State's financial disclosure law.<sup>342</sup> The purpose of the financial disclosure law is to maintain the public's trust and confidence in government through transparency and to aid in the prevention of corruption, favoritism, undue influence, and abuses of official position. Executive Law § 94 empowers JCOPE to interpret, administer, and enforce the financial disclosure law.

Financial disclosure statements provide the public with significant information about the outside holdings and associations of public officials and help to ensure that no prohibited conflicts of interest exist between public officials' State duties and private interests. They allow public officials, and the public, to consider on an annual basis potential conflicts of interest and violations of the ethics laws. Financial disclosure statements also serve as an important tool for regulatory and law enforcement agencies in investigating possible official misconduct.

JCOPE receives and processes approximately 30,000 financial disclosure statements each year, and is authorized to review them for completeness and compliance, notify filers of non-compliance, and initiate enforcement actions if a filer fails to file or files a false financial disclosure statement.

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<sup>341</sup> See 1987 N.Y. Laws c. 813. As discussed in Chapter 1, before the statute, in 1975, Governor Hugh Carey by Executive Order required the filing of a financial disclosure statement by Executive branch employees.

<sup>342</sup> *Id.* § 3.

## B. Who Must File

Pursuant to Public Officers Law § 73-a, the following individuals (“filers”) must file a financial disclosure statement with JCOPE:

- State officers or employees with an annual salary rate above the CSEA job rate of SG-24 (the “filing rate”) (\$99,394 as of April 2019), known as “threshold filers”;<sup>343</sup>
- State officers or employees designated as “policymakers” by their appointing authority;
- members of the Legislature;
- legislative employees;
- political party chairpersons representing jurisdictions with a population exceeding 300,000;
- statewide elected officials (governor, lieutenant governor, attorney general, and comptroller); and,
- candidates for statewide elected office or for member of the Legislature.<sup>344</sup>

State officers or employees include: heads of State departments and their deputies and assistants; officers and employees of statewide elected officials; officers and employees of State departments, boards, bureaus, divisions, commissions, councils, or other State agencies; and members or directors of public authorities, other than multi-state authorities, public benefit corporations, and commissions at least one of whose members is appointed by the governor, and employees of such authorities, corporations, and commissions.<sup>345</sup>

Members of the Legislature and legislative employees, as well as candidates for the Legislature, file their financial disclosure statements with the Legislative Ethics Commission.<sup>346</sup> A financial disclosure statement filed with the Legislative Ethics Commission is deemed filed with JCOPE as well.<sup>347</sup>

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343 The salary rate is the rate as of April 1 in the year the financial disclosure statement is due, and is posted on JCOPE’s website.

344 N.Y. Pub. Off. Law § 73-a(2)(a).

345 *Id.* § 73-a(1)(c).

346 *Id.* § 73-a(2)(a).

347 *Id.* § 73-a(d)(1).

The Legislative Ethics Commission then forwards the financial disclosure statements to JCOPE within the time period prescribed by § 73-a of the Public Officers Law.<sup>348</sup> All other filers submit their financial disclosure statements directly to JCOPE.<sup>349</sup>

### **C. Exemption from Filing a Financial Disclosure Statement**

Threshold filers (State officers or employees who are required to file a financial disclosure statement because their annual salaries are above the filing rate) who are not designated as policymakers may request an exemption from filing.<sup>350</sup> Agencies and employee organizations recognized or certified pursuant to Civil Service Law § 204 to represent public employees of a public employer may also request an exemption on behalf of a class of individuals in the same position.<sup>351</sup> JCOPE, at its discretion, may grant the exemption if the public interest does not require disclosure, and the filer's official duties do not involve negotiating, authorizing, or approving:

- contracts, leases, franchises, or similar matters;
- the purchase, sale, rental, or lease of real property, goods or services;
- the obtaining of grants of money or loans; or,
- the adoption or repeal of any rule or regulation having the force and effect of law.<sup>352</sup>

### **D. What Information Must Be Reported**

The financial disclosure statement requests information regarding the financial interests, economic activities, and outside associations of the filer, and, in some instances, his or her spouse and unemancipated children, from the previous calendar year (*i.e.*, a financial disclosure statement filed in 2017 requests information from calendar year 2016). The financial disclosure statement requires a filer to disclose information concerning, among other things, outside income, positions of authority, and employment; interests and

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<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> See N.Y. Exec. Law § 94(9)(k); 19 NYCRR 935.1 & 935.2.

<sup>351</sup> 19 NYCRR 935.1 & 935.2.

<sup>352</sup> N.Y. Exec. Law § 94(9)(k); 19 NYCRR 935.1 & 935.2.

contracts with State or local government; political party positions and activities; business relationships and clients; gifts; reimbursements related to official duties; interests in trusts; personal and business investments; employment agreements or interests with former or future employers; real property interests; receivables; and liabilities.

Whenever the financial disclosure statement requires a filer to report a “value” or “amount,” the filer need only report the category of the value or amount based on category Tables I and II included in the financial disclosure statement and prescribed by Public Officers Law § 73-a.<sup>353</sup> For example, a filer with reportable outside income of \$10,000 would report the categorical amount of such income as “D” (\$5,000 to under \$20,000) from Table I.

The Public Integrity Reform Act of 2011 expanded disclosure requirements effective for financial disclosure statements filed after January 1, 2013 regarding clients a filer may have from engaging in activities outside his or her State position. For the first time, filers were required to report the names of clients to whom they personally provided services, or to whom their firm provided services, in excess of \$10,000. In 2015, additional client disclosure questions were added to the statutory financial disclosure statement form. Specifically, filers who personally provide services to clients outside their State position must disclose the identity of the client and the amount of fees generated if the client pays the official or his or her firm over \$5,000 in the calendar year. Further, if the public official provided services to the client, or referred the client to the firm, and the client generates fees in excess of \$10,000 related to certain non-ministerial matters before the State, the public official must disclose the client, the amount of fees generated, and detailed information about the matter and the services provided. These disclosure requirements apply to client relationships or matters that began on or after December 31, 2015.

All client disclosure requirements include certain automatic exclusions, *e.g.*, medical, pharmaceutical, dental, or mental health services; residential real estate brokering services, or legal services related to law enforcement prosecutions and investigations, bankruptcy, family court, estate planning, or domestic relations matters.

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353 N.Y. Pub. Off. Law § 73-a(3).



## E. Procedures for Filing

### 1. Filing Due Dates

Each appointing authority annually submits a list of its financial disclosure statement filers to JCOPE, indicating whether the filer is a policymaker or a threshold filer.<sup>354</sup> Additionally, the State University of New York and the City University of New York also designate as “Academic Filers” academic employees who are not policymakers and are required to file because they have annual salaries in excess of the filing rate.

All filers—other than Academic Filers and candidates for statewide office or the Legislature—must file their financial disclosure statements on or before May 15.<sup>355</sup> Academic Filers must file their financial disclosure statements on or before November 15.<sup>357</sup>

State officers or employees whose annual salaries surpass the filing rate, or who are designated as policymakers, after the filing deadline must file within thirty days of the change in their salary or policymaker designation.<sup>358</sup> For example, a State employee who was not a policymaker as of May 15 (the filing deadline), but received that designation on July 1, is required to file the financial disclosure statement on or before July 31.

New State officers or employees (including policymakers) who are required to file a financial disclosure statement and commence employment after the filing deadline must file within thirty days of hire.<sup>359</sup> Thus, an Academic Filer who commences employment with the State on December 1 (after the November 15 filing deadline) must file their financial disclosure statement on or before December 31.

Candidates for statewide office or the Legislature must file a financial disclosure statement within ten days of the act nominating or designating them

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354 See *id.* at § 73-a(1)(c)(ii)-(iii).

355 See *id.* at § 73-a(2)(a).

356 Non-Academic filers reported to the Commission between April 16 through May 15, however, are allowed to file their FDS statement within thirty days of their name being so reported by their appointing authority.

357 Academic filers reported to the Commission between October 16 through November 15, however, are allowed to file their FDS statement within thirty days of their name being so reported by their appointing authority.

358 See *id.* at § 73-a(2)(e).

359 See *id.*

as a candidate.<sup>360</sup> JCOPE must identify and post on its website a list of candidates for statewide elected office or the Legislature who did not file their financial disclosure statements in a timely manner.<sup>361</sup>

A filer who leaves State service before the filing deadline is not required to file a financial disclosure statement. However, if the filer leaves State service **after** the filing deadline, he or she is still under obligation to file. JCOPE has jurisdiction over such filers for one year after they leave State service, and can commence an enforcement action against a non-compliant filer at any time during that one-year window.<sup>362</sup>

## ***2. Requests for Extension of Time to File a Financial Disclosure Statement***

Filers who are statewide elected officials, State officers or employees, or political party chairpersons may request a forty-five-day extension of time to file the financial disclosure statement, upon a showing of justifiable cause or undue hardship.<sup>363</sup> Such filers may also apply for an extension of time to file the financial disclosure statement if they have applied for an automatic extension of time to file their individual Federal income tax returns with the Internal Revenue Service (IRS) and are missing information requested by the financial disclosure statement because of the IRS extension.<sup>364</sup> In that event, the filer must still file a partial financial disclosure statement containing all of the other requested information by the filing deadline and then file a supplementary financial disclosure statement with all of the remaining information once the IRS extension expires.<sup>365</sup>

## ***3. How to File***

Filers may submit their financial disclosure statements electronically or by a paper form. Electronic filing is available through JCOPE's online filing system, which may be accessed through JCOPE's website. By filing online, a filer can prepopulate the financial disclosure statement with information from the prior year's financial disclosure statement, save their forms and access them online, and print a "receipt" showing that a financial disclosure statement was filed

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360 See *id.* at § 73-a(2)(a)(iii)-(viii).

361 *Id.* at § 73-a(2)(d).

362 See N.Y. Exec. Law. § 94(13)(c).

363 See *id.* at § 94(9)(c); 19 NYCRR Part 936.

364 19 NYCRR 936.6.

365 *Id.*

electronically. In 2018, approximately ninety-two percent of the financial disclosure statements received by JCOPE were filed electronically.

A paper financial disclosure statement must be mailed or delivered to JCOPE's office. Paper forms must be legible, completed in ink, and contain the filer's home address and an original signature. Noncompliant paper forms will be returned to the filer and deemed not filed. Paper forms must be received or postmarked on or before the filing deadline to be considered filed on time.

## **F. Public Inspection of Financial Disclosure Statements**

Pursuant to Executive Law § 94, JCOPE must make financial disclosure statements available for public inspection.<sup>366</sup> Financial disclosure statements filed by members of the Legislature and the four statewide elected officials are available on JCOPE's website. All other financial disclosure statements are available for public inspection upon written request.<sup>367</sup> The names of unemancipated children and filers' home addresses are automatically redacted from copies of financial disclosure statements made available for public inspection.

## **G. Requests for Redaction of Information from Public Inspection and for Exemption from Disclosing Certain Information**

### ***1. Redaction of Information from Public Inspection and Exemption from Disclosing Information Pertaining to Spouse and/or Unemancipated Child***

A filer may request that JCOPE redact specific information from the copy of his or her financial disclosure statement made available for public inspection.<sup>368</sup> The Executive Director of JCOPE, at his or her discretion, may grant the request if the information the filer is seeking to redact has no material bearing on the discharge of the filer's official duties.<sup>369</sup>

A filer may also request an exemption from disclosing specific information about his or her spouse and/or unemancipated child.<sup>370</sup> The Executive Director,

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366 N.Y. Exec. Law § 94(9)(e). JCOPE's regulations governing access to publicly available records are located at 19 NYCRR Part 937.

367 19 NYCRR 937.3.

368 See N.Y. Exec. Law § 94(9)(h).

369 See *id.*

370 See *id.* § 94(9)(i).

at his or her discretion, may grant the request if the filer's spouse, on his or her own behalf or on behalf of an unemancipated child, objects to the disclosure of such information, and the information has no material bearing on the discharge of the filer's official duties.<sup>371</sup>

Any time the Executive Director denies either type of request, the filer may file a notice of appeal with the full Commission within fifteen days.<sup>372</sup> The filer is provided with an opportunity to submit written arguments and documentary evidence to show that the Executive Director erred in denying the request.<sup>373</sup> Members of the Commission must consider the filer's submissions, in addition to the record provided by the Executive Director, in deciding the appeal, and issue a written decision within sixty days of the notice of appeal.<sup>374</sup>

## ***2. Exemption from Disclosing Client Information***

A filer may request an exemption from disclosing information regarding clients where disclosure is likely to cause harm.<sup>375</sup> The filer may seek the exemption from JCOPE or from the Office of Court Administration.<sup>376</sup> In the request for the exemption, the filer must state that his or her client is not receiving or seeking the filer's services in connection with certain non-ministerial matters before the State.<sup>377</sup>

In reviewing the request, JCOPE may consult with bar associations or other professional associations, as well as the Legislative Ethics Commission when the filer is subject to its jurisdiction, and may also consider the rules of professional conduct.<sup>378</sup> JCOPE must also conduct its own inquiry and consider factors such as:

- the nature and the size of the client;

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371 *See id.*

372 N.Y. Exec. Law § 94(9)(h)-(i); 19 NYCRR 941.17.

373 19 NYCRR 941.17.

374 *Id.*

375 *See* N.Y. Exec. Law § 94(9)(i-1).

376 Specifically, a filer may request an exemption from disclosing information in response to Questions 8(b-1), 8(b-2), and 8(c) of the financial disclosure statement. *See* Title 19 NYCRR Part 942 and 22 NYCRR Part 154.

377 *Id.*

378 *Id.*

- whether the client has any business before the State; and if so, how significant the business is; and whether the client has any particularized interest in pending legislation and, if so, how significant the interest is;
- whether disclosure may reveal trade secrets;
- whether disclosure could reasonably result in retaliation against the client;
- whether disclosure may cause undue harm to the client;
- whether disclosure may result in undue harm to the attorney-client relationship; and,
- whether disclosure may result in an unnecessary invasion of privacy to the client.<sup>379</sup>

JCOPE must promptly make a final determination in response to the exemption request and include an explanation for its determination.<sup>380</sup>

## H. Random Review Program

Pursuant to Executive Law § 94, JCOPE conducts a program of comprehensive random reviews of financial disclosure statements in order to ascertain compliance with the financial disclosure law.<sup>381</sup> Particular focus is devoted to confirming whether all responses on the financial disclosure statement are complete, directly relate to each question, and are consistent with internal documents maintained by JCOPE and relevant public information.<sup>382</sup> This program—in addition to the targeted review of high-profile State office holders—ensures that the public has access to complete and accurate information about the financial interests and potential conflicts of State officials and employees.

At the beginning of the calendar year, JCOPE determines the number of filers to be selected for random review. Financial disclosure statements are then selected in a manner in which the identity of any particular filer whose financial disclosure statement is selected is unknown to JCOPE and its staff before its selection, and in which all required filers have an equal probability of being selected.<sup>383</sup>

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379 *Id.*

380 *Id.*

381 *See* N.Y. Exec. Law § 94(9)(n).

382 *See id.*

383 *See id.*

After financial disclosure statements are selected for review, JCOPE conducts a two-stage preliminary examination.<sup>384</sup> The first stage examines the financial disclosure statement for completeness and whether responses are directly related to the questions. In particular, the examiner will look to see whether: the financial disclosure statement was signed and timely filed and dated; each question was answered; a response to a particular question indicates a potential missing or incomplete response to another question (for example, the filer reported having outside employment but did not report any outside income); and there are any unusual responses (for example, a filer with a policymaking position reported participation in political activities).

The second stage examines the financial disclosure statement for consistency with JCOPE's internal documents, including: financial disclosure statements previously submitted by the filer and/or the filer's spouse and unemancipated children, if they are filers; requests from the filer to JCOPE for an extension, redaction, or exemption; requests from the filer for an advisory opinion from JCOPE and the opinion itself, if one was issued by JCOPE; and requests from the filer to JCOPE for approval of outside activity and, if approved, JCOPE's approval letter. The examiner also reviews the financial disclosure statement for consistency with relevant public information, such as the State's active contract database and property records.

If further inquiry is warranted after the preliminary examination is complete, the examiner will provide a confidential written notice to the filer that his or her financial disclosure statement is under review, advising the filer of the specific areas of concern and providing the filer with fifteen days to respond to the notice.<sup>385</sup> If the filer fails to respond to the notice, staff will take appropriate action consistent with JCOPE's enforcement powers pursuant to Executive Law § 94, including referring the matter to JCOPE's Investigations and Enforcement Division.<sup>386</sup>

## **I. Penalties for Failure to File, Filing a Deficient Statement, or Making a False Filing**

If a filer fails to file a financial disclosure statement or files a deficient financial disclosure statement, JCOPE will send the filer a confidential notice of

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384 *See id.*

385 *See id.*

386 *See id.* at § 94(9)(n) & (12).

the failure to file or deficiency, providing the filer with fifteen days to file or cure the deficiency and advising the filer of the penalties for failure to comply.<sup>387</sup> If the filer fails to file or cure within the specified time period, JCOPE will send a notice of delinquency to the filer and the filer's appointing authority (or in the case of a statewide elected official, member of the Legislature, or a legislative employee, to the Temporary President of the Senate and the Speaker of the Assembly).<sup>388</sup> The notice of delinquency is a public document and is available upon request. The names of those who receive such notices are posted on the JCOPE website. JCOPE can send a notice of delinquency at any time during the filer's service with the State and up to a year after the filer leaves State service.<sup>389</sup>

A filer who knowingly and willfully fails to file a financial disclosure statement, or who knowingly and with intent to deceive makes a false statement or fraudulent omission in a financial disclosure statement, may be fined up to \$40,000 after a hearing.<sup>390</sup> In lieu of or in addition to such a penalty, JCOPE may refer the violation to the appropriate prosecutor for criminal prosecution as a misdemeanor offense and, in the case of a legislative officer or employee, JCOPE may refer the violation to the Legislative Ethics Commission to refer for criminal prosecution.<sup>391</sup> If convicted, the filer may be punished with up to one year of imprisonment.<sup>392</sup> The filer's appointing authority may also take disciplinary action against the filer.<sup>393</sup>

## J. FDS Enforcement Actions

In accordance with provisions of Executive Law § 94, JCOPE inspects all of the financial disclosure statements that are filed with the Commission to determine whether any person subject to the statutory reporting requirements has either failed to file such a statement, filed a deficient statement, or filed a statement which reveals a possible violation of Public Officers Law §§ 73 [Business or professional activities by State officers and employees and party officers], 73-a [Financial Disclosure], or 74 [Code of

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387 N.Y. Exec. Law § 94(12).

388 *Id.*

389 *Id.*

390 *Id.* at § 94(14); N.Y. Pub. Off. Law § 73-a(4).

391 N.Y. Exec. Law § 94(14); N.Y. Pub. Off. Law § 73-a(4).

392 See N.Y. Penal Law § 70.15(1).

393 N.Y. Exec. Law § 94(14); N.Y. Pub. Off. Law § 73-a(4).

Ethics]. In so doing, JCOPE has investigated and resolved several enforcement matters in recent years.

Two such matters<sup>394</sup> pertained to candidates for election to the state Legislature in 2018, each of whom, by virtue of their candidacy for elective state office, was required by law to comply with financial disclosure reporting requirements but failed to do so in a timely manner. Upon the admission by each of the two candidates of their respective knowing and willful failure to file the required financial disclosure statement by the statutory deadline, in violation of Public Officers Law § 73-a, payment of \$100 was made by each delinquent filer and compliance with the filing requirement was completed by each filer to settle their respective violation.

Another two enforcement matters<sup>395</sup> arising out of the knowing and willful failure of two academicians in the State and New York City university systems to file their required 2016 financial disclosure statements recently resulted in additional \$100 payments from each to settle the Public Officers Law violation and avoid further administrative and/or adjudicatory proceedings.

In other enforcement actions, failing to disclose outside employment and income earned by an employee of the Metropolitan Transportation Authority<sup>396</sup>, and not disclosing an uncompensated position of authority with an out-of-state business start-up by an employee of the New York Liquidation Bureau<sup>397</sup>, led to the payment by each State employee of an \$1,000 fine and admission of a violation of the Public Officers Law § 73-a to resolve their respective matter.

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394 See *In re Porter*, Case No. 18-212, New York State Joint Commission on Public Ethics Enforcement Actions (Mar. 26, 2019) and *In re Washington*, Case No. 18-210, New York State Joint Commission on Public Ethics Enforcement Actions (Mar. 26, 2019).

395 See *In re Khartoon*, Case No. 18-149, New York State Joint Commission on Public Ethics Enforcement Actions (Aug. 2, 2018) and *In re Barrios*, Case No. 18-170, New York State Joint Commission on Public Ethics Enforcement Actions (Jan. 14, 2019).

396 See *In re Persaud*, Case No. 17-060, New York State Joint Commission on Public Ethics Enforcement Actions (Dec. 6, 2017).

397 See *In re Marvet*, Case No. 17-133, New York State Joint Commission on Public Ethics Enforcement Actions (Jul. 10, 2018).



## LOBBYING REGISTRATION AND REPORTING

[Congress] has . . . merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much . . .

**United States v. Harriss, 347 U.S. 612 (1954)**

### **A. Purpose and History**

In the preamble to the first Regulation of Lobbying Act (Ch. 937, L. 1977), the New York State Legislature noted that:

. . . the operation of responsible democratic government requires that the fullest opportunity be afforded to the people to petition their government for the redress of grievances and to express freely to appropriate officials their opinion on legislation and government opinions . . .<sup>398</sup>

This acknowledgement and affirmation of the Constitution's framers' desire to safeguard the right to petition government for a redress of grievances is joined, however, by the notion that when there are those who expend or receive compensation to engage in this petitioning, of paramount importance is disclosing this activity to the people. In order to prevent a diminution of individual rights

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<sup>398</sup> Ch. 937, 1977 Leg. (N.Y. 1977).

and a chilling effect on political speech this original, and all subsequent laws regulating lobbying, make clear that unless one is compensated for, or expends money for, such activity no disclosure, registration, or reporting is required.

As noted, New York State's statutory regime over lobbying began in 1977, and continues to date. The first Regulation of Lobbying Act defined "lobbying" or "lobbying activity" as:

[A]ttempts to influence the passage or defeat of any legislation by either house of the legislature or the approval or disapproval of any legislation by the governor, or the adoption or rejection of any rule or regulation having the force and effect of law or the outcome of any rate making proceeding by a state agency.<sup>399</sup>

The Act created the Temporary State Commission on Lobbying ("Temporary Commission"), which, despite its seemingly ephemeral moniker, remained the sole regulator of lobbying in New York until 2007. The six-member commission was required to meet at least quarterly, and while the Governor made the appointments, four of the six seats were to be filled by the nominees of the legislative leaders. The Temporary Commission makeup also mandated that the membership be evenly divided across party lines, and that its Chair would alternate between parties for each three-year term.

Among its responsibilities, was administering:

- Limited registration and reporting requirements for lobbyists, public corporations, and clients. Notably, the threshold for reporting was the expenditure or receipt of more than \$1,000 in reportable lobbying expenditures. Lobbyists were required to submit quarterly filings following any period in which they received over \$250 for lobbying, and clients were required to submit annual reports of lobbying activity after exceeding the reporting threshold.
- A prohibition on the use of a contingent retainer, i.e., an agreement to pay a lobbyist based on the success or failure of a particular piece of legislation, rule, or regulation.
- Potential civil and misdemeanor criminal penalties for failing to file a lobbying report, though the penalty could also be imposed after the filer

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399 *Id.* at § 3(b).

had been notified of the violation, and been provided a reasonable period to cure the deficiency.<sup>400</sup>

Notably, the Act did not prohibit lobbyists and their clients from providing gifts to public officials.

As noted, the Temporary Commission was in place until the creation of JCOPE's immediate predecessor, the Commission on Public Integrity in 2007. In that twenty-nine year span, the Lobbying Act continued to evolve, adding significant provisions such as:

- Registration of employees of public New York State colleges when acting as a lobbyist (1981)<sup>401</sup>;
- Increasing the frequency of lobbying activity reporting from quarterly to bi-monthly (1999)<sup>402</sup>;
- Increased civil penalties for failure to file to \$5,000 (1981)<sup>403</sup>, and then \$25,000 (1999)<sup>404</sup>;
- Authorizing the Temporary Commission to establish a random audit program for the review of filings (1999)<sup>405</sup>;
- Regulation of lobbying before municipal governments (1999)<sup>406</sup>;
- Regulation of lobbying on tribal-state compacts and other tribal gaming agreements<sup>407</sup>;
- Regulation of governmental procurements, including the establishment of a restricted period in which lobbyists may only contact the designated procurement official at an agency (2005)<sup>408</sup>;
- Potential debarment of lobbyists who violate the procurement lobbying rules<sup>409</sup>; and,

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<sup>400</sup> Ch. 937, 1977 Leg. (N.Y. 1977).

<sup>401</sup> Ch. 1040, 1981 Leg. (N.Y. 1981).

<sup>402</sup> Ch. 2, 1999 Leg. (N.Y. 1999).

<sup>403</sup> Ch. 1040, 1981 Leg. (N.Y. 1981).

<sup>404</sup> Ch. 2, 1999 Leg. (N.Y. 1999).

<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> Ch. 1, 2005 Leg. (N.Y. 2005).

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

- A prohibition on lobbyists and clients providing gifts of more than \$75 to public officials, though campaign contributions were excluded from the definition of gift (1999).<sup>410</sup>

In 2007, the enactment of the Public Employee Ethics Reform Act not only disbanded the long-standing Temporary Commission, but combined its operations with that of the State Ethics Commission, placing jurisdiction for all of ethics and lobbying in the hands of the Commission on Public Integrity.<sup>411</sup> The statute also added a requirement that lobbyists disclose compensated activities to influence the disbursement of public monies.<sup>412</sup> Finally, in 2011, the Commission on Public Integrity was disbanded and reformed as JCOPE.

In 2018, JCOPE adopted the first comprehensive lobbying regulations, at 19 NYCRR Part 943, to serve as a resource for understanding and complying with the requirements of the Lobbying Act. Further, the regulations codify the constitutional authority of JCOPE to regulate grassroots lobbying, recognized in *United States v. Harris*<sup>413</sup> and exercised by JCOPE's predecessor agencies in accordance with the 1982 decision in *New York State Temporary Commission on Lobbying v. CICU*.<sup>414</sup>

JCOPE developed the regulations through a robust process that went beyond the minimal requirements of the State Administrative Procedure Act and included public hearings and extensive open Commission discussions of the regulations. The process began with a draft proposal first introduced in the fall of 2016, followed by the publication of a formal Notice of Proposed Rulemaking on August 23, 2017 and a Notice of Revised Rulemaking on February 14, 2018. On April 24, 2018, JCOPE Commissioners voted to approve the revised regulations which became effective on January 1, 2019.

In addition to providing clarification to the regulated community on reporting and disclosure requirements, the regulations promote greater transparency by identifying the "true" clients who seek to influence government and allowing for public access to more detailed information and disclosures surrounding lobbying activity in New York State.

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410 Public Officials, on the other hand, were prohibited from accepting any gift over seventy-five dollars, so in essence, the same restriction was in place for lobbyist, albeit without a penalty (other than if such gift constituted a bribe) for the lobbyist/client.

411 Ch. 14, 2007 Leg. (N.Y. 2007).

412 See Lobbying Act § 1-l.

413 347 U.S. 612 (1954).

414 534 F. Supp. 489 (1982).

The comprehensive regulations supersede any earlier precedent issued by JCOPE and its predecessor agencies to the extent any prior guidance, opinions, instructions, or practices are inconsistent.

## **B. What is Lobbying?**

It is important to remember that while attempts may be made to influence government, “lobbying activities”, under the Lobbying Act, is a limited and defined term. Specifically, the Act now prescribes that “lobbying” or “lobbying activities” mean any attempt to influence:

1. the passage or defeat of any legislation or resolution by either house of the state legislature including but not limited to the introduction or intended introduction of such legislation or resolution or approval or disapproval of any legislation by the governor;
2. the adoption, issuance, rescission, modification or terms of a gubernatorial executive order;
3. the adoption or rejection of any rule or regulation having the force and effect of law by a State agency;
4. the outcome of any rate making proceeding by a State agency;
5. any determination (A) by a public official, or by a person or entity working in cooperation with a public official related to a governmental procurement, or (B) by an officer or employee of the Unified Court System, or by a person or entity working in cooperation with an officer or employee of the Unified Court System, or by a person or entity working in cooperation with an officer or employee of the Unified Court System related to a governmental procurement;
6. the approval, disapproval, implementation, or administration of tribal-state compacts, memoranda of understanding, or any other tribal-state agreements and any other state actions related to Class III gaming as provided in 25 U.S.C. § 2701, except to the extent designation of such activities as “lobbying” is barred by the federal Indian Gaming Regulatory Act, by a public official or by a person or entity working in cooperation with a public official in relation to such approval, disapproval, implementation or administration;

7. the passage or defeat of any local law, ordinance, resolution, or regulation by any municipality or subdivision thereof;
8. the adoption, issuance, rescission, modification or terms of an executive order issued by the chief executive officer of a municipality;
9. the adoption or rejection of any rule, regulation, or resolution having the force and effect of a local law, ordinance, resolution, or regulation; or,
10. the outcome of any rate making proceeding by any municipality or subdivision thereof.<sup>415</sup>

While attempts to influence government in other activities may be governed by other laws, the only matters subject to the Lobbying Act are those enumerated above.

JCOPE's comprehensive regulations codify the types of lobbying that JCOPE and its predecessors have determined are reportable under the Act, which include Direct and Grassroots Lobbying.

### ***1. Direct Lobbying***

Direct Lobbying involves direct contact with a public official and attempting to influence government actions enumerated in Section 1-c(c) of the Lobbying Act, as well as facilitating an attempt to influence such action, i.e., the "door opener."<sup>416</sup> Examples of Direct Lobbying include making telephone calls, distributing written materials, sending e-mails, interacting on social media, and contact made during a Lobby Day.<sup>417</sup> In addition, mere attendance at a meeting can constitute lobbying, as an individual can exert influence over a public official by their physical presence, even if he or she remains silent. However, a person is not engaging in Direct Lobbying when the person attends a meeting with a public official simply to supply technical information, to provide clerical or administration assistance, or to observe for educational purposes.<sup>418</sup>

Further, as indicated above, lobbying includes having preliminary contact with a public official to facilitate lobbying activity. Specifically, when a lobbyist

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<sup>415</sup> See Lobbying Act § 1-c.

<sup>416</sup> 19 NYCRR 943.6(b)(1)(i) and (ii); Advisory Opinion No. 16-01.

<sup>417</sup> 19 NYCRR 943.6(b)(4).

<sup>418</sup> 19 NYCRR 943.6(b)(2).

knows or has reason to know that a client will attempt to influence a public official on a matter covered by the Lobbying Act and engages in facilitating that contact, including scheduling a meeting or telephone call with a public official, and introducing a client to a public official, then he or she is engaging in reportable lobbying activity.

### ***a. Direct Lobbying and Social Media***

Given the evolving methods of direct communication, particularly in the realm of social media, the new regulations address when modern forms of advocacy translate into reportable lobbying. The following are examples of when a person may engage in Direct Lobbying by using social media to communicate with a public official:<sup>419</sup>

- (a) The communication is directly sent to a social media account that is known to be owned or controlled by a public official;
- (b) The communication creates a direct link to any social media account known to be owned or controlled by a public official; or,
- (c) A communication is knowingly targeted to the public official's staff.

For example, a post on a public official's social media page or a post on a person's own social media page that tags a public official would constitute Direct Lobbying. Further, an organization engaged in Direct Lobbying via social media must identify as an Individual Lobbyist any employee of the organization who makes direct contact with a public official in the course of the individual's employment unless it is part of a mass social media campaign.<sup>420</sup> Even if an organization is not required to identify employees as Individual Lobbyists, it must disclose any reportable expenses attributable to the organization's social media activities, which includes staff time allocated to planning and posting the social media message.<sup>421</sup>

### ***b. Direct Lobbying and Lobby Days***

Another form of Direct Lobbying takes place on Lobby Days. Lobby Days are select days used by organizations when members of an organization meet

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419 19 NYCRR 943.6(c)(1) and (2).

420 19 NYCRR 943.6(c)(3)

421 19 NYCRR 943.6(c)(4).

with public officials at various levels to advocate on issues relevant to the organization.<sup>422</sup> An employee or Designated Lobbyist of an organization that is coordinating a Lobby Day is engaging in Direct Lobbying (and must be identified as an Individual Lobbyist on the lobbyist filings) if the employee (a) makes direct contact with the public official and (b) speaks on behalf of the organization.<sup>423</sup> However, a volunteer or member of an organization that coordinates a Lobby Day is not required to be listed as an Individual Lobbyist of the organization.<sup>424</sup>

For example, if an employee of an organization coordinating a Lobby Day meets with a public official and speaks on behalf of the organization, then that employee must be identified as an Individual Lobbyist by the organization. Similarly, if a Designated Lobbyist of an organization coordinating a Lobby Day is engaged in Direct Lobbying, then that person must be identified as an Individual Lobbyist for the organization.<sup>425</sup> However, a volunteer who travels to the capital as part of a Lobby Day merely to attend a rally would not have to register or be identified on a filing. An organization that coordinates a Lobby Day must report related lobbying expenses including, but not limited to, the time spent by the organization's compensated employees at the Lobby Day, staff time for planning, and transportation expenses.<sup>426</sup>

## ***2. Grassroots Lobbying***

Grassroots Lobbying, or indirect lobbying, is when a person or organization solicits another to deliver a lobbying message to a public official. The following are examples of Grassroots Lobbying: rallies; billboards; print media advertisements; websites; social media communication; television and radio commercials, letter writing campaigns, or personal requests by a lobbyist for another person to contact a public official.<sup>427</sup>

In order to be considered Grassroots Lobbying, a person or organization must attempt to indirectly influence a governmental decision using communication that:

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422 19 NYCRR 943.3(j).

423 19 NYCRR 943.6(b)(4)(i).

424 19 NYCRR 943.6(b)(4)(c).

425 19 NYCRR 943.6 (b)(4)(i).

426 19 NYCRR 943.6(b)(4)(ii).

427 19 NYCRR 943.7(e).



- (a) Reference or otherwise implicate an action enumerated in section 1-c(c) (i)-(x) of the Lobbying Act;
- (b) Take a clear position on that action; and,
- (c) Include a Call to Action.<sup>428</sup>

All three of the above-referenced criteria must be met in order to constitute a Grassroots Lobbying Communication.

When reporting a Grassroots Lobbying Communication to JCOPE, the identification of an Individual Lobbyist may not be required because Grassroots Lobbying Communications are often delivered under the banner of an organization, e.g., advertising, rather than by an individual.<sup>429</sup> In these cases, the activity is attributable to the party making the original request or solicitation, not necessarily the ultimate deliverer of the message to the public official. To that end, in the context of Grassroots Lobbying, uncompensated volunteers who assist in delivering the lobbying message to a public official (e.g., members of the public who sign a petition or send a form email) are not considered lobbyists even though they may have engaged in reportable lobbying activity.

However, there are cases when Individual Lobbyists must be disclosed. If an individual delivers the message and is identifiable as the speaker, he or she may need to be identified in filings. Specifically, an employee of an organization must be identified as an Individual Lobbyist for the organization when the employee: (1) delivers a Grassroots Lobbying Communication, (2) can be identified as the speaker, and (3) the employee participates in shaping the message in the course of the person's employment.<sup>430</sup> For example, an employee of an organization that speaks at a rally on behalf of his or her organization, in the course of his or her employment, and delivers a Grassroots Lobbying Communication, must be identified by the organization as an Individual Lobbyist. In addition, an organization must also identify as an Individual Lobbyist any individual or entity that is retained by an organization to deliver a Grassroots Lobbying Communication and speaks for, represents, or endorses the position of the Client.<sup>431</sup>

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<sup>428</sup> 19 NYCRR 943.7.

<sup>429</sup> 19 NYCRR 943.7 (a)(2) and (3).

<sup>430</sup> 19 NYCRR 943.6(c)(2).

<sup>431</sup> 19 NYCRR 943.7(d).

The following, alone, would not constitute Grassroots Lobbying: owners of billboards or signs; copy editing; advertisement writers; storyboard artists; film crews; photographers; video editors; website managers, hosts, or internet service providers; media outlets or broadcasters; media buyers or placement agents; delivery services; or clerical staff.

#### *a. Grassroots Lobbying and Social Media*

Social media can also be a mechanism for transmitting a Grassroots Lobbying Communication. In this scenario, reportable expenses attributable to an organization's Grassroots Lobbying efforts can include consulting services, sponsoring posts, staff time allocated to planning and posting, search engine optimization and sponsoring, and advertising.<sup>432</sup> Similar to Direct Lobbying, the activities and expenses for Grassroots Lobbying via social media are attributable to the organization when the personal social media activities is conducted by employees of the organization in the course of their employment.

### *3. Procurement Lobbying*

In 2005, the law was amended to add procurement to the list of governmental actions subject to the Lobbying Act. In doing so, the Act not only required registration and reporting for efforts to influence certain State and local purchasing actions, but also created a system of controls designed to protect the integrity of state procurements. To wit, the Lobbying Act provided that "government procurement" began with an agency's "determination of need"—some public announcement of an intent to proceed with a purchasing decision—and after that point, any attempt to influence the procurement would be subject to the Lobbying Act.<sup>433</sup> Lobbying activities are permissible between the determination of need and the issuance of a request for proposals.

For purposes of State procurements, from the issuance of a request for proposal until the final contract award, a new statutory "restricted period" is in effect.<sup>434</sup> As a result, the only communication that may take place between an entity seeking to influence the procurement and the agency is through

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<sup>432</sup> 19 NYCRR Part 943.7(f)(2).

<sup>433</sup> Lobbying Act § 1-c(p).

<sup>434</sup> *Id.* at 1-c(m), 1-n.

the agency's designated point(s) of contact. This ban against *ex parte*-like communication helps to ensure that the procurement is awarded based on the appropriate criteria. The Act also provides for significant exceptions to the "blackout" during the restricted period, including protests, complaints, and appeals.<sup>435</sup>

#### ***4. Municipal Lobbying***

While lobbying before municipalities generates a sizable portion of JCOPE's filings, the requirement that lobbyists and clients disclose this activity was not added to the Lobbying Act until 1999. As initially drafted, attempts to influence county and municipal governmental entities constituted regulated lobbying in those jurisdictional subdivisions with a population exceeding 50,000 (excluding school districts). In 2015, the Lobbying Act was amended,<sup>436</sup> lowering the jurisdictional population threshold for municipal lobbying reporting from 50,000 to 5,000 (as well as removing the exclusion for school districts). As a result, JCOPE's lobbying oversight now extends from the State level to 61 counties, over 900 towns, over 60 cities, and over 700 school districts.

Notably, while municipal procurements are subject to lobbying reporting, the "restricted period" limitation on communications during such procurements does not apply to municipal government purchasing.

### **C. Types of Lobbyists**

A lobbyist is a person or an organization that engages in lobbying activity on behalf of itself or another. In some instances, a lobbyist and the person or organization on whose behalf the lobbying activity is conducted on behalf of, can be one and the same. The regulations define the following types of lobbyists: Retained, Employed, and Designated.<sup>437</sup> Retained Lobbyists include a person or entity that engages in lobbying for the benefit of an unaffiliated client (as well as an independent contractor paid by the lobbying organization who does not constitute an Employed Lobbyist).<sup>438</sup> An Employed Lobbyist is a

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435 See Lobbying Act § 1-c(c).

436 Ch. 56, 2015 Leg., § 6 (N.Y. 2015) Part CC.

437 19 NYCRR 943.3(n).

438 19 NYCRR 943.3(u); see 19 NYCRR 943.3(h).

person who lobbies on behalf of his or her organization.<sup>439</sup> A Designated Lobbyist is any person who lobbies on behalf of a client as board member, director or officer, regardless of compensation, and does not otherwise constitute a Retained Lobbyist.<sup>440</sup>

#### **D. Types of Clients**

Prior to the adoption of its regulations, JCOPE required the disclosure of a lobbyist's client as well as any other person or entity that was an intended beneficiary from the lobbying activity, also known as a third-party beneficiary. This reporting requirement was meant to identify the "true" client of a lobbyist. In order to memorialize this principle of the "true client", the regulations create new definitions for a client of a lobbyist and clarify the roles and disclosure requirements of each type of client. To that end, under the regulations, a Client includes both a Contractual and Beneficial Client.<sup>441</sup> As such, a lobbyist must now identify and report *both* a Contractual Client and Beneficial Client in its filings. A Contractual Client is an individual or organization that retains the services of a lobbyist for the benefit of itself or another, and is responsible for filing the Client Semi-Annual Report (*see* p. 134). A Beneficial Client is a specific individual or organization on whose behalf and at whose request or behest the lobbying activity is conducted. It can also include a member of a Coalition. In the case where an organization hires a lobbyist to lobby on its behalf (or itself lobbies on own behalf), the Contractual Client and Beneficial Client are the same. To contrast, when a client hires an intermediary to retain lobbying services on the client's behalf, the intermediary serves as the Contractual Client, while the original client is the Beneficial Client. The identification of the Beneficial Client is significant not only for transparency purposes, but also because the regulations clarify that the prohibition on gifts to officials, the ban on contingent fees, and the requirement to disclose sources of funding apply to the Beneficial Client.

#### **E. Multiple Party Relationships and Coalitions**

Lobbying reports filed with the Commission must disclose all entities in a Lobbyist/Client relationship. In some instances, a Lobbyist/Client relationship

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<sup>439</sup> 19 NYCRR 943.3(h).

<sup>440</sup> 19 NYCRR 943.3(g).

<sup>441</sup> 19 NYCRR 943.3(f).

involves multiple lobbyists that rendered services, whether on a single contract or through a subcontracting arrangement. The regulations clarify how to report lobbying activity that involves multiple lobbyists.

### ***1. Sub-Lobbyists and Co-Lobbyists***

In general, there are three categories of lobbyists in a multiple lobbyist arrangement: Prime Lobbyist, Sub-Lobbyist, and Co-Lobbyist. A Prime Lobbyist is the original lobbyist that is retained by a client and retains the services of another individual or entity to perform work that is within the lobbyist's agreement with a Client.<sup>442</sup> A Sub-Lobbyist is a lobbyist who is engaged by a Prime Lobbyist to perform services within the scope of the contract between the Prime Lobbyist and Contractual Client.<sup>443</sup> For example, a Client retains Lobbying Firm A to lobby on their behalf and Lobbying Firm A retains Lobbying Firm B to perform a portion of the services under the lobbying agreement.

Under this arrangement, the Client, which is both the Contractual Client and Beneficial Client, reports the Prime Lobbyist as the lobbyist and discloses the lobbying activity by the Prime Lobbyist on their behalf. The Prime Lobbyist has two relationships to report: one as the lobbyist and one as the client of the Sub-Lobbyist. Filing as the lobbyist, the Prime Lobbyist reports its Client and all Sub-Lobbyist arrangements and describes its own lobbying activity. Filing as the client of the Sub-Lobbyist, the Prime Lobbyist reports its contractual relationship, as the Contractual Client, with the Sub-Lobbyist as well as its own lobbying activity.<sup>444</sup> Here, both the Prime Lobbyist and Sub-Lobbyist must report their activity, separate and apart from one another, and disclose only services that they each provided.<sup>445</sup>

A Co-Lobbyist is a lobbyist who is retained by a client on the same single retainer agreement or contract with the Prime Lobbyist.<sup>446</sup> Similar to Sub-Lobbyists, Co-Lobbyists must report their own lobbying activity and are not responsible for disclosing the activity of the other lobbyist.

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442 19 NYCRR 943.9(h)(2)(j)(a).

443 19 NYCRR 943.9(h)(2)(i)(b).

444 19 NYCRR 943.9(h)(2)(i)(c)-(e).

445 19 NYCRR 943.9(h)(2)(i)(c).

446 19 NYCRR 943.9(h)(2)(iii).

## 2. Coalitions

The new regulations define a Coalition as a group of otherwise unaffiliated entities or members who pool funds for the primary purpose of engaging in lobbying activities on behalf of the members of the Coalition.<sup>447</sup> A Coalition does not include an organization that qualifies as exempt under sections 501(c)(5) or (c)(6) of the Internal Revenue Code.<sup>448</sup> The Commission's goal in defining Coalitions and providing clarity on how Coalitions should report their lobbying activity was to improve transparency without discouraging the formation of Coalitions.

If a Coalition expends or incurs more than \$5,000 in annual compensation and expenses related to lobbying activity, then it has the two options for reporting such activity:

*Option 1:* The Coalition files its own report as a lobbyist and/or client;<sup>449</sup> or,

*Option 2:* The Coalition members who are required to file a lobbying report, either through the Coalition activity and/or other lobbying activity engaged in by the member, must disclose their own contribution to the Coalition.<sup>450</sup>

## F. JCOPE Reports and Filings

Generally, reporting requirements under the Lobbying Act apply to both those who are paid to lobby and those who pay others to lobby.<sup>451</sup>

### 1. Lobbyists—Statements of Registration

Under the Lobbying Act, a Statement of Registration is required of anyone retained, employed, or designated to lobby who receives, expends, or incurs (or reasonably anticipates receiving, expending, or incurring) more than \$5,000 in a year in lobbying compensation and expenses.<sup>452</sup> The \$5,000 threshold is cumulative across all lobbying activity engaged in by the lobbyist on behalf of a client, whether as a Beneficial Client or Contractual Client.<sup>453</sup> This

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<sup>447</sup> 19 NYCRR 943.9(h)(3)(a).

<sup>448</sup> 19 NYCRR 943.9(h)(3)(a)(i).

<sup>449</sup> 19 NYCRR 943.9(h)(3)(ii)(a).

<sup>450</sup> 19 NYCRR 943.9(h)(3)(ii)(b).

<sup>451</sup> See Lobbying Act § 1-c et seq.

<sup>452</sup> See Lobbying Act § 1-e.

<sup>453</sup> *Id.*; 19 NYCRR 943.9(c).

requirement applies to both those lobbyists externally retained by clients, as well as to those organizations that utilize employed or in-house lobbyists. In the case of employed lobbyists, the employer organization is deemed both the lobbyist and the client, and any internal employees who engage in lobbying are identified as the individual lobbyists.<sup>454</sup>

This document is filed at the beginning of a period of lobbying (usually a calendar year), and provides information about the relationship as well as on the anticipated lobbying activity, including whether such activity is Direct Lobbying or Grassroots Lobbying. A lobbyist/lobbying organization that is required to register must file a separate Statement of Registration for each client regardless of compensation received from that client.<sup>455</sup>

Statements of Registration are required to be filed for each biennial period in which lobbying will occur. The first of these filing periods was 2005-2006, and JCOPE is currently administering the 2019-2020 registration period. The regulations also provide that when a lobbying contract or agreement exists, a lobbyist has the option of submitting the contract or agreement along with the Statement of Registration or execute a Lobbying Agreement form provided by the Commission. However, a lobbyist may not submit a written authorization in lieu of the contract or agreement.<sup>456</sup>

Notably, all registered lobbyists must have mandatory ethics training. Specifically, all registered Lobbyists must:

- (i) Complete the online ethics training provided by JCOPE within 60 days of initial registration;
- (ii) Complete the training again within three years of the date the Lobbyist first or subsequently completed the training, if such Lobbyist is still registered to lobby at such time; and/or,
- (iii) If there is a lapse in a Lobbyist's registration, complete the training again within 60 days of re-registration to lobby or three years from the date such Lobbyist last completed such training, whichever is later.

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<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> 19 NYCRR 943.10(j).

## ***2. Lobbyists—Bi-monthly Reports***

Any lobbyist required to file a Statement of Registration must also file regular Bi-monthly Reports of lobbying activity on behalf of each client.<sup>457</sup> These reports must disclose not only the lobbying activities but also the compensation and expenses received, expended, or incurred for lobbying. The Bi-monthly Reports are required in every period in which the registration remains in force and effect, regardless of whether any lobbying activity occurred during the period.

As mentioned above, these Reports include many of the same elements as those required in the Statement of Registration (in addition to compensation and expenses). However, in contrast with Statements of Registration (which are forward-looking estimates of pending lobbying activity) the Bi-monthly Reports are retrospective statements of actual activity that occurred.

Reports are generally due on the following dates:

- March 15 (covering January 1–February 28);
- May 15 (covering March 1–April 30);
- July 15 (covering May 1–June 30);
- September 15 (covering July 1–August 31);
- November 15 (covering September 1–October 31); and
- January 15 (covering November 1–December 31).<sup>458</sup>

## ***3. Clients—Semi-Annual Reports***

While lobbyists file biennial Statements of Registration and Bi-monthly Reports for each Contractual Client, client filers are only required to file a single Semi-Annual Report covering all their lobbyists—whether retained (external) or employed (internal). A Client Semi-Annual Report is due from any client that reasonably anticipates it will expend or incur more than \$5,000 in compensation and expenses paid to lobbyists per year.<sup>459</sup> In an effort to remove a duplicative filing requirement, under the new regulations, lobbyists who only lobby on their own behalf and file regular bi-monthly reports are not

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<sup>457</sup> Section 1-h of the Lobbying Act.

<sup>458</sup> *Id.*

<sup>459</sup> Section 1-j of the Lobbying Act.



required to also submit a Client Semi-Annual Report, other than source of funding disclosures.<sup>460</sup>

The Client Semi-Annual Reports are due every six months, on July 15 (covering January 1–June 30) and January 15 (covering July 1–December 31). They serve as a check against information reported by a lobbyist. As an example, when a lobbyist discloses that it was paid \$10,000 by a client to lobby in each of the first three bi-monthly periods of a year, the corresponding client report would be expected to show \$30,000 in compensation paid to that particular lobbyist for the six-month semi-annual reporting period. JCOPE’s audit and compliance programs identify and remedy any such discrepancies when they arise.<sup>461</sup>

However, because these Client Reports include all payments to lobbyists regardless of the amount, it may be that a client is required to disclose a small payment to a lobbyist, while the lobbyist may not be required to file a corresponding lobbyist Statement of Registration and Bi-monthly Reports. In this case, the lobbyist receiving the payment may not have received more than \$5,000 in total compensation and expenses.

Client Semi-Annual Reports require disclosing Reportable Business Relationships and Source of Funding Reporting. As in Lobbyist Statements of Registration, under the Reportable Business Relationship filing guidelines, a client (or lobbyist) must disclose any arrangement whereby the client or lobbyist provides a public official with more than \$1,000 for any goods, services, or other exchange of value.

#### ***4. Source of Funding Reporting***

In 2011, the Public Integrity Reform Act amended the Lobbying Act to require disclosing the names of donors for groups whose lobbying costs constitute a sufficiently large percentage of their overall annual expenditures. Specifically, under that law lobbying clients and lobbyists who lobby on their own behalf, who spend more than \$50,000 in a year on lobbying in New York, when such costs exceeded three percent of total expenditures, are required to publicly disclose each “Source of Funding” over \$5,000.<sup>462</sup> In 2016, the thresholds for

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460 19 NYCRR 943.12(d)(1)(i).

461 Section 1-d of the Lobbying Act.

462 Ch. 399, 2011 Leg. (N.Y. 2011).

making such disclosures were reduced: groups now only have to spend \$15,000 on lobbying in New York (while still exceeding three percent of overall expenditures), and must disclose sources contributing more than \$2,500.<sup>463</sup>

JCOPE promulgated regulations at 19 NYCRR Part 938 in 2012 (most recently amended in 2016) to provide instruction and guidance on how to satisfy these donor disclosure rules. Most significantly, the 2018 amendments (promulgated in conjunction with the comprehensive lobbying regulation at Part 943) clarify that the requirement to disclose sources of funding applies not to the contractual client, but to the beneficial client(s) in a lobbying relationship.

#### *a. Sources, Contributions, and Affiliate Relationships*

The regulations provide that a Source is any person, corporation, partnership, organization, or entity that makes a contribution to or for the benefit of a covered lobbyist or client, which is intended to fund, in whole or in part, the client filer's activities or operations.<sup>464</sup> While the statutory language prescribes the disclosure of contributions used to fund a filer's lobbying activity, JCOPE determined, acknowledging the fungibility of money, that contributions do not have to be earmarked for lobbying in New York state to be captured by the Source of Funding disclosure requirements. In other words, if a donor provides funds to an entity that lobbies in New York, that entity has discretion to use those funds, or other funds that become available due to the donor's contribution, to support its lobbying operations. Contributions from persons or entities with an affiliate relationship<sup>465</sup> must be aggregated when assessing whether a Source has contributed more than \$2,500.

#### *b. Timing Issues*

Source of funding disclosures are submitted every six months as part of the Client Semi-Annual Report, on July 15 and January 15. Whether the \$15,000/3% Expenditure Threshold has been met depends on the period to which it has been applied. Filers are required to calculate whether their lobbying

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463 Ch. 286, 2016 Leg., § 1 (N.Y. 2016), Part D. Under the Lobbying Act, Section 501 (c)(3) corporations are not required to disclose sources of funding to JCOPE although there are requirements, the validity of which are in litigation as of this date, which would require such disclosure, under certain circumstances to the Office of Attorney General. N.Y. Exec. Law §§ 172-e and 172-f.

464 19 NYCRR 938.2(b).

465 19 NYCRR 938.2(a).

expenditures trigger the disclosure requirements using a twelve-month calculation, which covers the twelve-month period preceding and including the last day of the applicable client semi-annual reporting period, or if the threshold is not met, a calendar-year calculation, which covers January 1 to the last day of the applicable client semi-annual reporting period.

For the Client Semi-Annual Report due in January each year, the Expenditure Threshold period is the same using either calculation: the preceding twelve months which also corresponds with the calendar year (January 1—December 31). The total lobbying compensation and expenses for the calendar year is measured against the Client filer's total expenditures for the same period. For the Client Semi-Annual Report due in July, the Expenditure Threshold period is either the preceding twelve months (July 1 of the previous year—June 30 of the present year) or the preceding six months (January 1—June 30).<sup>466</sup>

### *c. Disclosures*

As noted above, only those Sources who contribute more than \$2,500 in the aggregate must be disclosed by persons or entities who have met the \$15,000/3% Expenditure Threshold during the expenditure threshold period. This simple rule, however, has many twists and turns.

#### 1. For the First Client Semi-Annual Report

Covering January 1—June 30

If the client filer has met the Expenditure Threshold, the client filer should aggregate all contributions received from a Source, including affiliated Sources, and if the sum of such contributions is over \$2,500, then such Source of Funding must be disclosed in this Client Semi-Annual Report. Any contributions from Sources under \$2,500 are not required to be disclosed.

#### 2. For the Second Client Semi-Annual Report

Covering July 1—December 31

If the client filer has met the Expenditure Threshold during the second client semi-annual reporting period, the client must disclose all Sources of Funding in accordance with the following:

3. If the client filer ***did not meet*** the Expenditure Threshold in the first client semi-annual reporting period, then no contributions received from any Source during the first reporting period should be added to contributions received from the same Source in the second reporting period to determine if the total is over \$2,500. Only those contributions from Sources who contributed more than \$2,500 in the second reporting period should be disclosed.
4. If the client filer ***met*** the Expenditure Threshold in the first client semi-annual reporting period ***and disclosed*** contributions from a Source in the first Client Semi-Annual Report (since they presumably amounted to more than \$2,500), then ***all*** contributions received from that same Source during the second reporting period should be disclosed in the second Client Semi-Annual Report, regardless of the amount received in the second half.
5. If the client filer ***met*** the Expenditure Threshold in the first client semi-annual reporting period and received contributions from a Source in the first reporting period that ***were not disclosed*** because they were not over \$2,500, then the client filer should add all contributions, regardless of amount, received by the same Source over the calendar year and disclose each Source of Funding that contributed more than \$2,500, collectively, during the calendar year.

#### ***d. Information Disclosed***

For each Source of Funding required to be disclosed in a Client Semi-Annual Report, the client filer must provide:

1. The name of the person, corporation, partnership, organization, or entity making the contribution;
2. The name and address of the principal place of business;
3. The date the contribution was received, and,
4. The reportable amount of the contribution.

### *e. Reportable Amount of Contribution*

The amount reported as a contribution is calculated according to a formula and depends on whether the contribution is earmarked for lobbying and whether the contribution consists entirely or partly of membership dues, fees, or assessments. If a contribution is earmarked for lobbying, then it is 100% reportable. If a contribution is given without any such designation, then a formula is used to determine the reportable amount. In addition, any contributions for membership dues, fees, or assessments are *not* included in the Reportable Amount of Contribution. Such contributions count toward the \$2,500 threshold, however, and a donor may need to be identified as a Source of Funding.<sup>467</sup>

The Reportable Amount of Contribution is calculated as follows:

Amount of Contribution multiplied by (Reportable Compensation  
and Expenses of Lobbying in NYS divided by Total Expenditures)  
plus any \$ amount specifically earmarked for Lobbying by a Source.

### *f. Exemptions*

Lobbying Act §§ 1-h(c)(4) and 1-j(c)(4) provide certain exemptions from Source of Funding Disclosure.<sup>468</sup> A Client filer may either seek an exemption for a particular Source or a blanket exemption for all of its Sources. Regarding particular Sources, the law provides disclosure shall not be required if JCOPE determines that such disclosure may cause harm, threats, harassment, or reprisals to the Source or to individuals or property affiliated with the Source. The Client filer has a statutory right to appeal any denial by JCOPE.

For blanket exemptions, an Internal Revenue Code § 501(c)(4) exempt organization may apply to exclude all of its sources from disclosure. JCOPE may grant such a request, should it determine that the applicant's activities relate to any area of public concern that creates a substantial likelihood that disclosure would lead to harm, threats, harassment, or reprisals to a Source or

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<sup>467</sup> Ch. 286, 2016 Leg., § 1 (N.Y. 2016) Part D; If a source's contributions consist only of membership dues, fees, or assessments, the client filer should disclose the reportable amount of contribution as \$0 and include all other information regarding the Source. If only a portion of a Source's contribution includes membership dues, fees and assessments, the client filer should first subtract the amount of the Source's contribution relating to membership dues, fees or assessments from the contribution amount and then follow aforementioned calculation formula.

<sup>468</sup> See 19 NYCRR 938.

to individuals or property affiliated with such Source, including, but not limited to, the area of civil rights and civil liberties, and any other area of public concern determined by JCOPE to form a proper basis for exemption. The regulations set forth a non-exclusive list of factors for JCOPE to consider in making its determination, including:

1. Specific evidence of past or present harm, threats, harassment, or reprisals of the Source or client filer or individuals or property affiliated with the Source(s) or client filer.
2. The severity, number of incidents, and duration of past or present harm, threats, harassment, or reprisals of the Source(s) or client filer or individuals or property affiliated with the Sources(s) or client filer.
3. A pattern of threats or manifestations of public hostility against the Source(s) or client filer or individuals or property affiliated with the Sources(s) or client filer.
4. Evidence of harm, threats, harassment, or reprisals directed against organizations or individuals holding views similar to those of the Source(s) or client filer.
5. The impact of disclosure on the ability of the Source(s) or client filer to maintain ordinary business operations and the extent of resulting economic harm.<sup>469</sup>

The only right to appeal JCOPE determinations relating to blanket exemption requests is through an Article 78 proceeding.

### ***5. Public Corporation Reporting***

The Lobbying Act also requires that a Public Corporation<sup>470</sup> that retains or employs a lobbyist file its own set of lobbyist and client reports. Pursuant to Lobbying Act §§ 1-e and 1-i of the, there is no distinction among the elements or content of reports filed by Public Corporations and those filed by more “traditional” lobbyists and clients. However, in an apparent contradiction, while

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<sup>469</sup> See 19 NYCRR 938.4(a)(1)-(5).

<sup>470</sup> Defined as a “municipal corporation, district corporation, or a public benefit corporation as defined in section sixty-six of the general construction law.” See Section 1-c(i) of the Lobbying Act.

the Lobbying Act clearly mandates Public Corporation lobbying filings, at the same time provides that “[t]he term ‘lobbyist’ shall not include any officer, director, trustee, employee, counsel or agent of the state, or any municipality or subdivision thereof of New York when discharging their official duties; except those officers, director, trustees, employees, counsels, or agents of colleges, as defined by section two of the Education Law.”<sup>471</sup> JCOPE and its predecessors have interpreted this exclusion to require that the Public Corporation itself file the registration, rather than require a State or municipal officer to register in their own name on the basis of fulfilling their official job duties.

### ***6. Procedures for Filing***

As discussed above, lobbyists, clients, and Public Corporations are all required to file various registration and periodic activity reports with JCOPE, which encourages filers to utilize the online filing system, but also authorizes the submission of hard-copy paper filings.

The newly-redesigned electronic filing system allows filers to submit required reports twenty-four hours per day, and provides a mechanism for submitting nearly all reports required under the Lobbying Act. In order to utilize this system, all individuals are required to have a personal NY.gov ID account and create a new User Profile. That can be done through JCOPE’s website and the electronic filing system.

Pursuant to the Lobbying Act and JCOPE’s internal records retention schedules, paper and electronic filings submitted under the Lobbying Act are retained and available for public inspection for a period of six years.

In the event an amendment to a previously-submitted filing is required, filers are required to make such amendments within ten days of the change to the information.<sup>472</sup> A common example is an adjustment to reported lobbyist compensation because of a “write-down” or other business decision to adjust or waive a fee previously billed to a client. In this case, once the accounting decision, i.e., to adjust the receivable has been made, the lobbyist has ten days to amend the compensation previously reported in the Bi-monthly Lobbying Report.

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<sup>471</sup> See Lobbying Act Section 1-c(a).

<sup>472</sup> See Lobbying Act Section 1-e et seq.

### 7. *Fees, Fines, and Penalties*

Pursuant to Lobbying Act §§ 1-e and 1-j of the, Lobbying Statements of Registration and Client Semi-Annual Reports require an accompanying filing fee of \$200 or \$50, respectively.<sup>473</sup> No filing fee is required for lobbyist bi-monthly reports, or for any amendments to required filings.<sup>474</sup> Further, no filing fee is required of any Public Corporation required to file a biennial statement of registration.

JCOPE held its first lobbying hearings on fail to file actions in 2015, and assessed its largest Lobbying Act penalty up to that point, \$180,000, against State Advisers, LLC, in 2016 for both failing to file timely and completely file reports (including failing to pay filing fees and submit retainer agreements), and failing to pay subsequent late fees.

Later in 2015, JCOPE settled an action against Glenwood Management, Inc. for \$200,000, regarding its failure to register as a lobbyist and submit its Lobbyist and Client filings in relation to its lobbying of then-Senator Skelos.<sup>475</sup>

Other notable Lobbying Act enforcement actions include a \$98,000 fine against Uber Technologies, Inc. for underreporting its 2015 and 2016 lobbying spending by \$6.3 million,<sup>476</sup> a \$50,000 fine against Housing Works, Inc., for failing to file required Lobbying Act reports over a five-year period,<sup>477</sup> and fines of \$15,000 and \$12,000 against DCI Group AZ, LLC<sup>478</sup> and Potomac Communications Strategies, Inc.,<sup>479</sup> respectively, for failure to submit required filings. The Lobbying Act also authorizes JCOPE to impose fines for filings received after the statutory due dates. It may assess fines in an

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<sup>473</sup> For Statements of Registration covering only the second year of the Biennial reporting period, the filing fee is prorated to \$100.

<sup>474</sup> See Lobbying Act § 1-h, *et seq.*

<sup>475</sup> See *In re Glenwood Management Corp.*, Case No. 16-093, New York State Joint Commission on Public Ethics Enforcement Actions (Dec. 28, 2016).

<sup>476</sup> See *In re Uber Technologies, Inc.*, Case No. 17-049, New York State Joint Commission on Public Ethics Enforcement Actions (Jun. 5, 2017).

<sup>477</sup> See *In re Housing Works, Inc.*, Case No. 15-092, New York State Joint Commission on Public Ethics Enforcement Actions (Oct. 22, 2015).

<sup>478</sup> See *In re DCI Group AZ, LLC*, Case No. 15-037, New York State Joint Commission on Public Ethics Enforcement Actions (May 12, 2015).

<sup>479</sup> See *In re Potomac Communications Strategies, Inc.*, Case No. 15-038, New York State Joint Commission on Public Ethics Enforcement Actions (May 12, 2015).



amount up to twenty-five dollars per day<sup>480</sup>, but JCOPE generally adheres to the following fee schedule:

Days Late	Action	
	<i>First-Time Filers</i>	<i>All Other Filers</i>
1–7 days	Grace Period/No Late Fee	
8–14 days	\$75 flat late fee	\$150 flat late fee
15–30 days	\$150 flat late fee	\$300 flat late fee
31–90 days	\$300 flat late fee	\$500 flat late fee
91–180 days	\$500 flat late fee	\$1,000 flat late fee
181 days and more	\$1,000 flat late fee	\$2,000 flat late fee

Further, pursuant to Lobbying Act §§ 1-o and 1-k, and as described below, there are potential criminal, civil, and debarment penalties for knowing and willful violations of the following provisions:

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480 Late fees may not exceed ten dollars per day for a first-time filer.

PENALTY			
VIOLATION	Criminal Penalty	Civil Penalty	Debarment Penalty
Failure to timely file	Class A misdemeanor	Up to the greater of \$25,000 or three times the amount unreported	
<i>Subsequent Offense(s)</i>	Class E felony on subsequent conviction within five years		One-year ban from all lobbying on felony conviction
			One-year ban from procurement lobbying on subsequent civil violation
		Up to five times the value of compensation or benefit while violating one-year ban	Four-year ban on procurement lobbying for violating one-year ban
False Filing	Class A misdemeanor	Up to the greater of \$50,000 or five times the amount improperly reported	
<i>Subsequent Offense(s)</i>	Class E felony on subsequent conviction within five years		One-year ban from all lobbying on felony conviction
			One-year ban from procurement lobbying on subsequent civil violation
		Up to five times the value of compensation or benefit while violating one-year ban	Four-year ban on procurement lobbying for violating one-year ban
Gift violation	Class A misdemeanor	Up to the greater of \$25,000 or three times the value of the gift	One-year ban from all lobbying on felony conviction
<i>Subsequent Offense(s)</i>			Four-year ban on procurement lobbying for violating one-year ban
			One-year ban from all lobbying on felony conviction
			Four-year ban on procurement lobbying for violating one-year ban
Restricted Period violation	N/A	Up to \$10,000	N/A
<i>Subsequent Offense</i>	N/A	Up to \$25,000 for violation within four years	N/A
Failure to maintain records	N/A	Up to \$2,000 per violation	N/A
Contingent Fee violation	Class A misdemeanor	Up to the greater of \$10,000 or the value of the contingent fee	

## G. Prohibitions

In addition to the registration and reporting requirements imposed on lobbyists and lobbying clients, the Lobbying Act provides that there are two prohibitions with which these regulated parties must abide.

First, neither a lobbyist nor a client (either contractual or beneficial) may give a gift to a public official. Notably, JCOPE has enforced this provision in a series of recent actions. In 2015, JCOPE settled an action alleging improper gifts with Health Management Systems, Inc., an organization registered to lobby on its own behalf.<sup>481</sup> Health Management Systems agreed to pay a \$75,000 fine to address allegations that it gave meals and beverages to a State employee while working with the employee on pending regulatory and legislative matters impacting Health Management Systems.<sup>482</sup>

JCOPE also settled an action with Administrators for the Professions, Inc., the manager and operator of Physicians Reciprocal Insurers, a reciprocal insurance company for healthcare institutions.<sup>483</sup> In the action, Administrators for the Professions, a registered lobbyist, agreed to pay \$70,000 to settle allegations that it paid Adam Skelos, son of former New York State Senate President *Pro Tempore* Dean Skelos, for a job that Adam Skelos failed to perform. The settlement agreement notes that even after observing the younger Skelos' non-performance, Administrators for the Professions continued to pay him, at the demand of then-Senator Skelos.<sup>484</sup>

Furthermore, the Lobbying Act, the Public Officers Law, and the Commission's regulations also restrict gifts that a public official may direct to a third party, or that are made or offered to a third party on a public official's "designation or recommendation or on his or her behalf."<sup>485</sup> Two lobbying entities entered into settlements with the Commission arising out of contributions to a not-for-profit entity in response to direct solicitations from an elected official and his representative. One lobbyist contributed his own funds as well as collected funds from nine of his lobbying clients. As part of a

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481 See *In re Health Management Systems, Inc.*, Case No. 14-084a, New York State Joint Commission on Public Ethics Enforcement Actions (Jun. 25, 2015)

482 *Id.*

483 See *In re Administrators for the Professions, Inc.*, Case No. 16-094, New York State Joint Commission on Public Ethics Enforcement Actions (Dec. 28, 2016)

484 *Id.*

485 See Public Officers Law § 73(5)(c); 19 NYCRR 933.3(d) and 934.3(e).

settlement, the lobbyist agreed to pay a fine of \$40,000.<sup>486</sup> Another lobbying entity agreed to pay a fine of \$10,000 in connection with two separate donations made at the request of the public official and the public official's representative.<sup>487</sup>

Second, a lobbyist may not accept, and a client (either contractual or beneficial) may not provide for compensation for lobbying that is conditioned on the success or failure of legislation, regulation, or other executive action; such contingency fees are expressly prohibited and subject to civil and criminal penalties, as discussed above.

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486 See *In re Capalino and Associates*, Case No. 16-090, New York State Joint Commission on Public Ethics Enforcement Actions (Mar. 30, 2018).

487 *In re NYCLASS, Nislick, and Neu*, Case No. 17-088, New York State Joint Commission on Public Ethics Enforcement Actions (Apr. 5, 2018).

## **APPENDIX**

### **ADVISORY OPINION NO. 18-01**

#### **Reviewing and clarifying the application of the post-employment provisions of the Public Officers Law.**

#### **SUMMARY**

The Public Officers Law's post-employment restrictions promote the public's confidence in State government by barring State employees, after leaving State service, from unfairly leveraging relationships and knowledge developed during their employment to unjustly benefit themselves or others. Given their nature, these restrictions are not only of significant interest to every former, current, and future State employee, but to entities that hire such individuals after State service, as well as the public.

Over the last 30 or more years, the Joint Commission on Public Ethics (the Commission) and its predecessors have developed a considerable corpus of opinions to address the many instances where post-employment restrictions come into play; by necessity, this has been an ongoing process and as the world has grown more complicated, so have the various situations confronted with the statutory bars. It logically follows that after such a period, it makes sense for the Commission to step back and take a look at the advice it and its predecessors have given to see whether the legal conclusions that it has drawn remain not only clear, but relevant and true and aligned with the underlying policy of the Public Officers Law which the Commission is exclusively charged with interpreting.

This Advisory Opinion does not undermine existing exceptions to the post-employment bar, but it does resolve difficulties and ambiguities that may have

accrued over the years in applying the post-employment restrictions and, thereby, better aligns day-to-day practice under the Public Officers Law with that law's underlying policy objectives. Advisory Opinion 18-01 will ensure that post-employment restrictions do not unduly restrict an individual's ability to engage in his or her occupation where such restrictions are not needed under the law to protect the integrity of and public confidence in government; restricting for the sake of restricting is not what the law requires.

With respect to the 2-year bar, going forward, the Commission will interpret and apply the "appear or practice" clause consistent with Advisory Opinion No. 99-17 which clearly bars those communications and actions by a former state employee within 2 years of leaving State service which are intended to influence that employee's former agency to make a specific decision or to take a specific action. Similarly, the Commission will interpret the "backroom services" clause to prohibit being compensated for rendering services to a person or entity in connection with a matter before that person's former agency with respect to a decision by the agency that advances its mission.

The lifetime bar can be a particularly onerous prohibition, because it never expires. The restriction focuses on a particular matter and the individual's role, if any, in that matter while in State service. But experience has shown that given the complexity and lengthy disposition of many matters, there is no "one size fits all" method of applying the bar. Indeed, while most "projects" may be sufficiently discrete to constitute a single transaction for lifetime bar purposes, applying this concept across the board without analyzing the nature of the transaction, including the amount of time spent on consummating it, and the specific role and level of involvement of a State employee could produce a prohibition of excessive and unnecessary scope which is not mandated by law or and does not further public policy.

Thus, going forward, the Commission will continue to consider on a case-by-case basis whether a large, extensive project is a single transaction for lifetime bar purposes. The Advisory Opinion sets forth a non-exhaustive list of factors the Commission will consider when determining whether the lifetime bar applies in the context of a large project, and indeed, any government decision. These common-sense factors will serve as meaningful guideposts to State employees, private employers, and the public as to what constitutes ethical conduct.

## **ADVISORY OPINION NO. 18-01:**

### **Reviewing and clarifying the application of the post-employment provisions of the Public Officers Law**

#### **INTRODUCTION**

The New York State Joint Commission on Public Ethics (“Commission”) issues this Advisory Opinion pursuant to its authority under Executive Law § 94 to address issues that have arisen in numerous requests for guidance, and during the panel discussion hosted in the fall of 2017,<sup>489</sup> regarding the application of the post-employment restrictions in the Public Officers Law. This Opinion clarifies the Commission’s position with respect to applicable precedent, based on many years of experience in applying the law. First, going forward, the Commission will interpret and apply the two-year bar’s “appear or practice” clause pursuant to the holding in Advisory Opinion No. 99-17, that is to say, to prohibit communications and actions that are intended to influence one’s former agency to make a specific decision or to take a specific action. Similarly, the Commission will interpret the “backroom services” clause to prohibit a former State employee from rendering services in relation to an attempt to influence their former agency with respect to a decision that best advances its mission and the public interest. Finally, when applying the lifetime bar, the Commission will examine various factors discussed herein to determine whether a “project” constitutes a single transaction.

It is intended that this Advisory Opinion will effectively calibrate the balance between: (a) the interest in protecting the public’s confidence in State

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<sup>489</sup> On October 26, 2017, the Commission, together with the Center for New York City Law at the New York Law School, presented a continuing legal education program, “Ethics Law in New York State: History, Enforcement and Leaving State Service.”

government; (b) avoiding unnecessary—and unintended—restrictions on the ability of former State employees to practice their profession and earn a living; and (c) recruiting knowledgeable and experienced individuals to State service.<sup>490</sup>

## BACKGROUND

The post-employment restrictions in the Public Officers Law (POL) are an important part of the State's ethics regime. They help promote the public's confidence in State government by establishing rules that prevent former State employees, after leaving State service, from leveraging relationships and knowledge developed during their State service to benefit themselves or others.<sup>491</sup> New York's post-employment restrictions serve the same purpose as similar laws passed on the national level:

[t]he post-employment restrictions can be said to reflect the same intent expressed by Congress when it enacted the federal restrictions on post-employment activities—that “[f]ormer officers should not be permitted to exercise undue influence over former colleagues, still in office, in matters pending before the agencies [and] they should not be permitted to utilize information on specific cases gained during government service for their own benefit and that of private clients. Both are forms of unfair advantage.”<sup>492</sup>

Crucially, the post-employment provisions are not meant to “preclude one from practicing a given trade, profession or occupation, but rather to prevent a

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490 This Advisory Opinion pertains to the two-year bar and lifetime bar, set forth at Public Officers Law §§ 73(8)(a)(i) and (ii), which apply to state officers and employees, as those terms are defined by Public Officers Law § 73(1)(i). It is not intended to affect the post-employment provisions in the Public Officers Law that relate solely to members and employees of the Legislature. *See* Public Officers Law § 73(8)(a)(iii). Additionally, this Advisory Opinion does not eliminate or otherwise alter any exception to the post-employment restrictions, whether specifically set forth in statute, or previously delineated by the Commission or its predecessors in prior Advisory Opinions that interpret the statute. *See* Public Officers Law § 73(8)(b)-(i); New York State Ethics Comm'n, Advisory Op. No. 91-01 and New York State Joint Comm'n on Pub. Ethics Advisory Op. No. 17-03 (both addressing exceptions to post-employment restrictions for full-time students).

491 *See* New York State Ethics Comm'n, Advisory Op. No. 88-01; New York State Ethics Comm'n, Advisory Op. No. 90-19; *see also* New York State Ethics Comm'n, Advisory Op. No. 91-02 (holding that post-employment rules are intended to “preclude the possibility that a former State employee may leverage his or her knowledge, experience and contacts gained in State service to his or her *own* advantage or that of a client.” [Emphasis in original.]

492 New York State Ethics Comm'n, Advisory Op. No. 88-01. The federal two-year bar is discussed in some detail at pp. 10-11, *infra*.



former employee from unfairly trading on contacts and information garnered while in State service.”<sup>493</sup> Therefore, the post-employment restrictions do not prohibit a former State employee from accepting employment with any particular employer. Rather, they prohibit a former employee from providing certain services to, or on behalf of, private actors. In this way, the statute carefully balances various governmental and public interests, including the State’s interests in recruiting personnel and guarding against certain acts involving, or appearing to involve, the unfair use of prior State employment for private benefit.<sup>494</sup>

The Commission<sup>495</sup> has been charged with interpreting and enforcing the post-employment restrictions, and a substantial portion of the day-to-day inquiries that the Commission receives stems from applying these rules. They are of significant interest to former, current, and future State employees because they apply to virtually every State employee when leaving State service. Historically, when opining on the post-employment provisions, the Commission has promoted continuity by relying on precedent in the form of Advisory Opinions issued by its predecessor agencies. Over time, however, while addressing numerous inquiries, some of the precedents may not be as clear as they could be about the policy rationale for their conclusions and how to apply them going forward. Additionally, some interpretations of the statutory language may produce results that unduly restrict individuals’ ability to engage in their occupation with correspondingly little or no gain in protecting the integrity of the State government.

## **HISTORICAL APPLICATION OF THE POST-EMPLOYMENT RULES**

The post-employment restrictions as currently constituted were enacted on August 7, 1987, pursuant to § 2 of Chapter 813 of the Laws of 1987. Contained in Public Officers Law § 73(8)(a), there are two types of post-employment restrictions: a two-year bar on activity before the State agency where a former State employee

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493 New York State Ethics Comm’n, Advisory Op. No. 94-02.

494 See Memorandum of the U.S. Office of Government Ethics, Sept. 23, 2016, at [https://www.oge.gov/web/oge.nsf/All+Advisories/3741DC247191C8B88525803B0052BD7E/\\$FILE/LA-16-08.pdf?open](https://www.oge.gov/web/oge.nsf/All+Advisories/3741DC247191C8B88525803B0052BD7E/$FILE/LA-16-08.pdf?open).

495 The Commission is the successor to the New York State Ethics Commission (1988-2007) and the New York State Commission on Public Integrity (2007-2011).

worked, and a lifetime bar relating to specific matters in which a former employee was personally involved in State service.<sup>496</sup> The two-year bar and the lifetime bar apply to all former State officers and employees except the four statewide elected officials and officers of State boards, commissions or councils who are uncompensated or compensated on a per diem basis.<sup>497</sup> The restrictions apply regardless of how long an employee worked for the State,<sup>498</sup> or the employee's level of responsibility or exercise of discretion in the former state function.<sup>499</sup> There is no exception for workers who were hired on a part-time or seasonal basis.<sup>500</sup>

### **The Two-Year Bar**

The two-year bar is contained in Public Officers Law § 73(8)(a)(i):

No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before such agency.<sup>501</sup>

This provision contains two distinct clauses, each of which restricts former State employees from interacting with their former agency. The first clause prohibits former State employees from appearing or practicing before their former agency (the “appear and practice” clause). The second provision prohibits former State employees from receiving compensation for rendering services in relation to any case, proceeding, application, or other matter in aid of others

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496 New York State Ethics Comm’n, Advisory Op. No. 95-19.

497 This exclusion from the definition of “state officer or employee” for purposes of Public Officers Law § 73 is found in § 73(1)(i)(iii).

498 New York State Ethics Comm’n, Advisory Op. No. 99-16.

499 New York State Ethics Comm’n, Advisory Op. No. 91-17.

500 New York State Ethics Comm’n, Advisory Op. No. 94-04. There is a narrow exception for former State employees who were employed “on a temporary basis to perform routine clerical services, mail services, data entry services or other similar ministerial tasks . . .” Public Officers Law § 73(8)(f). The post-employment restrictions will not prohibit this class of former State workers from providing similar services to a State agency, as an employee of a company that is under contract with the State agency to provide such services. This narrow exception to the post-employment restrictions is rarely invoked.

501 Public Officers Law § 73(8)(a)(i).

who will appear or practice before their former agency (the “backroom services” clause). Both provisions cease to impact a former State employee two years after such individual’s separation from State service. In 1990, the State Ethics Commission held that “[t]he two-year bar is absolute and bars [a former employee] from any activity before [his former agency] regardless of the subject matter.”<sup>502</sup>

### *The Appear or Practice Clause*

Consistent with its early interpretation of the two-year bar as an absolute prohibition, the State Ethics Commission applied the appear or practice clause quite broadly to include virtually any communication with one’s former agency because, it held a “‘communication’ by a former State employee on behalf of a client or any person amounts to an appearance or practice before his or her former agency prohibited by § 73(8) [that] would be barred whether or not compensation is received for the services rendered.”<sup>503</sup>

Under this broad interpretation of the appear or practice clause, prior Advisory Opinions held that prohibited communications with one’s former agency include: submitting a contract proposal to one’s former agency;<sup>504</sup> making a Freedom of Information Law request to one’s former agency on behalf of another individual or entity;<sup>505</sup> submitting a resume to one’s former State agency with respect to a project that has been awarded to a private contractor where the former State agency retains the right to approve the former State employee for the job he is seeking;<sup>506</sup> participating in a colleague’s telephone call to the former agency or advising a colleague to mention the individual’s name in a telephone call to the former agency;<sup>507</sup> and requesting data from one’s former agency, whether or not such data is publicly available.<sup>508</sup>

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502 New York State Ethics Comm’n, Advisory Op. No. 90-19.

503 New York State Ethics Comm’n, Advisory Op. No. 89-07. The reference to a communication on behalf of “any person” must include the former employee since the post-employment restrictions are understood as intended to prevent a former State employee from gaining undue benefits for himself or others. *See* n.2, 3 and 5, *supra*. *See also*, New York State Ethics Comm’n Advisory Op. No. 94-06 (affirming that a “communication” with one’s former agency violates the appear or practice clause).

504 New York State Ethics Comm’n, Advisory Op. No. 89-09.

505 New York State Ethics Comm’n, Advisory Op. No. 89-07.

506 New York State Ethics Comm’n, Advisory Op. No. 91-17.

507 New York State Ethics Comm’n, Advisory Op. No. 97-01.

508 New York State Ethics Comm’n, Advisory Op. No. 94-20.

Advisory Opinion No. 94-05 provides a good example of broadly applying the appear or practice clause. In that matter, the former State employee reported that he was being considered for employment with a private company to perform duties essentially the same as those which he was then performing for his former agency; specifically, he would review files at the agency's location and take notes, and would not be "giving direction for change." The Opinion further described the duties as:

. . . sitting in a room, apart from the claims personnel, and physically looking at files which were pre-requested from the [State agency], and making notes thereon. At no time would [the requesting individual] interact with the claims personnel, nor make requests for information, nor make requests or give direction on the handling of any files at the [State agency].

[The private company] also states that they would like [the requesting individual] to be permitted to call the [State agency] to ask claims questions on behalf of an insured, such as why a claimant is not being paid or whether there has been a recent hearing on the claim.<sup>509</sup>

This description of the proposed job duties appears to reflect no attempt whatsoever to influence a decision or action of the agency. Nevertheless, the State Ethics Commission found that that these duties exemplified the types of activities that the post-employment restrictions were intended to prevent:

Applying the law to [these] circumstances, it would be a violation of the two-year bar for [the requesting individual] to appear before his former agency by reviewing files there and to receive compensation for that review on cases before the [State agency]. It would also be a prohibited appearance for [the requesting individual] to call his former agency to ask questions on behalf of an insured. *This is the very harm which is addressed by the revolving door provisions.*<sup>510</sup>[Emphasis added.]

The Commission's predecessors have also held that the appear or practice clause prohibits former State employees from contracting with their former

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509 New York State Ethics Comm'n, Advisory Op. No. 94-05.

510 *Id.*

agency, because “such contracting would require contact with the former employing agency which constitutes a prohibited appearance.”<sup>511</sup> Indeed, a later Opinion specifically held that the two-year bar is violated when former State employees are compensated for working pursuant to a contract with their former agency, such that the nature of the work they are to perform is irrelevant, as is the fact that they would have no contact with employees of their former agency.<sup>512</sup> These precedents have prohibited all former State employees from rendering services to their former agency pursuant to an employment or staffing contract, even in positions which do not involve efforts to influence the agency to take any substantive decision or action. For example, under such reasoning, a maintenance worker cannot accept a contractual assignment with his former agency through a staffing agency. It is the Commission’s view that this interpretation is excessively strict and unnecessary, as it does not advance the policy objectives of the post-employment rules. As discussed below, that result is not dictated by the statutory language, and it is inconsistent with established precedent applying the appear and practice clause.

### *The Backroom Services Clause*

The backroom services clause of Public Officers Law § 73(8)(a)(i) prohibits a former State employee from receiving compensation for rendering services to any person or entity “behind the scenes” in relation to any case, proceeding or application or other matter before the individual’s former agency. A violation of the backroom services clause may occur even when there is no appearance,<sup>513</sup> and even if the former agency does not know of the former employee’s participation in the matter.<sup>514</sup> This provision safeguards against the former employee’s using “inside information” behind the scenes to gain a favorable outcome from his former agency.<sup>515</sup> The specific prohibition is on being compensated for providing back room services, so rendering backroom services for free would not violate the two-year bar.

Simply stated, a former State employee violates the backroom services clause

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511 New York State Ethics Comm’n, Advisory Op. No. 90-22; *see also* New York State Ethics Comm’n, Advisory Op. No. 94-21.

512 New York State Ethics Comm’n, Advisory Op. No. 94-04.

513 New York State Comm’n on Pub. Integrity, Advisory Op. No. 08-02.

514 *See* New York State Ethics Comm’n, Advisory Op. No. 90-07.

515 New York State Ethics Comm’n, Advisory Op. No. 99-17.

of the two-year bar when a person or non-governmental entity pays such former employee to prepare documents, or to assist another person to prepare documents, where it is foreseeable that the documents will be submitted to and reviewed by their former agency.<sup>516</sup> The bar applies even if the employee's name does not appear on the documents, and the agency does not know of the individual's involvement in the matter.<sup>517</sup> For example, a former State employee may not be compensated for assisting clients to prepare license applications for submission to his former agency.<sup>518</sup> A former State employee may not serve as a paid consultant and assist clients to prepare and submit applications for grants from her former agency as "this would constitute the rendition of services for compensation in a matter before her former State agency."<sup>519</sup> Prohibited backroom services also include providing behind-the-scenes guidance, such as instructing or advising a colleague to place a telephone call to one's former agency on a matter that is before the agency.<sup>520</sup>

Some of this Commission's predecessors adopted an even more expansive interpretation by holding that an individual renders services even if she submits *no* work product to her former agency, and in no way seeks to affect its decision-making. For example, in Advisory Opinion No. 95-31, it was held that when an agency establishes an outsourcing program, the two-year bar prohibits former employees of the agency from working for a private contractor on an outsourcing contract for two years, "as they would be rendering services for compensation in a matter before their former agency." The opinion did not consider the nature of the work to be performed by the former employees, or the fact that they would have no contact with employees of their former agency.<sup>521</sup>

### ***Advisory Opinion No. 99-17***

Advisory Opinion No. 99-17 marked a turning point for the State Ethics Commission and its interpretation of the two-year bar. It involved a former

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516 See, *Id.*; see also New York State Ethics Comm'n, Advisory Op. No. 94-06; New York State Ethics Comm'n Advisory Op. No. 97-05 (quoting Advisory Op. No. 94-06); New York State Ethics Comm'n, Advisory Op. No. 99-17.

517 New York State Ethics Comm'n, Advisory Ops. No. 97-05, 94-06

518 New York State Ethics Comm'n, Advisory Op. No. 97-15.

519 New York State Ethics Comm'n, Advisory Op. No. 90-21.

520 New York State Ethics Comm'n, Advisory Op. No. 97-01.

521 New York State Ethics Comm'n, Advisory Op. No. 95-31.

Department of Transportation (DOT) employee who wished to work for a consulting engineer firm as a “Construction Inspector” on a State road reconstruction project. The former State employee reported that the reconstruction project was designed by a DOT design group and would be funded with federal, State, and city funds. The completed design would be turned over to the local city engineering department, which would be responsible for printing plans, advertising for bids, and awarding and administering the contract work. The city had selected the engineering firm as the consultant for inspection services on the project.

DOT personnel would make periodic site inspections to ensure compliance with design specifications, but day-to-day administration of the project would be the responsibility of the city. DOT engineers would be consulted only if the project required design changes or other modifications, or if DOT’s expertise were required. As a private Construction Inspector for field operations on the project, the former employee would be in a position that would not require him to participate in meetings that might include DOT representatives, write reports that would be submitted to DOT, take part in decisions relating to change orders or progress estimates, nor otherwise seek guidance from DOT staff. Rather, as a Construction Inspector, he would be responsible for observing the contractor’s work and taking measurements to ensure compliance with specifications, keeping daily records of work performed, documenting problems on the job site and payments due the contractor for work completed, and observing the contractor’s work zone safety measures and reporting deficiencies to the contractor for corrective action.

Before addressing the facts at hand, the State Ethics Commission first discussed a New York State Supreme Court opinion in an earlier matter that overturned the Commission’s long-standing interpretation of the appear or practice clause of the two-year bar. The case involved a former DOT traffic signal mechanic who left State service in January 1997. Three months later, the former employee began working for a private subcontractor on a State project to improve an interstate highway, where his job was to install traffic counters in the new roadway. During the course of the project, the former employee became aware that DOT had refused to accept a load of concrete and had ordered a different grade of concrete instead. After the subcontractor had replaced the concrete, the former employee asked a DOT engineer whether the first load

could have been used on the job, and the engineer agreed that it would have met specifications.

Based in part upon his contact with the DOT engineer, the State Ethics Commission determined that the former employee had violated the two-year bar by “appear[ing]” before DOT within two years of leaving State service. On appeal, however, the State Supreme Court reversed that determination.<sup>522</sup> The Court noted that the former employee “did not attempt to influence any DOT employee or capitalize through the use of his stature as a former DOT employee.” It wrote:

The Court agrees with petitioner’s position that he merely “communicated” with his former agency when he brought the concrete discrepancy to the DOT agent’s attention at the [job] site . . . [H]is communication with the DOT agent is not barred by Public Officers Law §73. Contrarily, the Legislature explicitly included a communication prohibition in Public Officers Law §73(8)(a)(ii), the lifetime ban provision,<sup>523</sup> which . . . prohibits, *inter alia*, “communicat[ing]” with a state agency on a project which a person was directly concerned. The fact that the Legislature elected to include the verb “communicate” in subsection (ii) but not subsection (i) of section 73(8)(a) suggests very strongly that the Legislature did not intend to prohibit former employees from “communicating” with their former agency on business they were not involved with during their state employment. Thus, the Ethics Commission’s long standing policy of expanding the interpretation of the verbs “appear or practice” to include “communicat[ion]” is not supported by the plain language of the statute. . . .

Upon reviewing the Supreme Court decision, the State Ethics Commission revisited the statute. With respect to the appear or practice clause, the Commission concluded that:

[T]he phrase “appearing or practicing” reaches only efforts to influence a decision of the former agency or to gain information from the agency that is not generally available to the public. It does not proscribe all contact with the agency.<sup>524</sup>

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522 *Helin v. New York State Ethics Commission*, unreported decision of Supreme Court, Albany County, Malone, J., dated May 21, 1999.

523 The lifetime bar is discussed at pp. 12-17, *infra*.

524 New York State Ethics Comm’n, Advisory Op. No. 99-17.



The State Ethics Commission also found it appropriate to revisit the backroom services clause. Citing its decision in Advisory Opinion No. 94-20, it recognized that its precedents suggested that the backroom services clause:

. . . could be construed to bar a former DOT employee from working in any capacity for a private contractor on a DOT highway project . . . A rule that DOT's mere involvement in a project is sufficient to make the project a "matter" before the agency would go far to preventing individuals leaving DOT from finding work in the area of their expertise *without advancing the goals of the State's ethics law*.

More importantly, nothing in the language or legislative history of the backroom services clause requires such a result. . . . Under well-established principles of statutory interpretation, the term "matter" should be construed in accordance with the terms that immediately proceed it—*i.e.*, case, proceeding, or application. (McKinney's Statutes §234[b].) Plainly, each of those terms involves an instance in which the agency is involved in the process of rendering a decision that best advances its mission and the public interest. Thus, when an agency awards a contract, promulgates a regulation or adjudicates a claim, there is a matter before the agency. But once a contract has been awarded, the contract itself is not a matter before the agency, and a former employee is not prohibited from working on the contract merely because his former agency has awarded it.<sup>525</sup>

Having adopted these principles, it concluded that the two-year bar would not prohibit the former DOT employee from serving as a Construction Inspector for a contractor on a DOT project. It found that the former State employee would not be involved in project meetings at which DOT employees would be present, would not take part in change order decisions, and would have no need to seek guidance from DOT. His contacts would be with the contractor and not with his former agency, and he would not seek to influence DOT's decisions on the project. Accordingly, the position would not require the former State employee to appear or practice before his former agency.

Moreover, the individual's job would involve field oversight of the work by the contractor—not any work performed by DOT. The former State employee

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525 *Id.* (emphasis added).

would report any deficiencies in the contractor's work to the company's own resident engineer. The resident engineer will attempt to resolve the issue, and, if unsuccessful, the matter would be brought to the City administering the project for resolution. Under these circumstances, the individual would not be performing services on a matter before DOT.

The principal points to be drawn from Advisory Opinion No. 99-17 are that: (1) the appear or practice clause does not apply to all attempts to communicate with one's former agency but, rather, it only captures attempts to influence a decision or action of one's former agency; and (2) the backroom services clause does not prohibit all work for a private entity on a matter involving one's former agency, but is, rather, limited to scenarios where the agency would be rendering a decision that advances its mission and the public interest. Advisory Opinion No. 99-17 also suggests that an interpretation of the post-employment rules may be overbroad when it restricts a former State employee's professional activities while failing to serve the policy goals underlying the rules.

### *The Two-Year Bar Going Forward*

In Advisory Opinion No. 99-17, the State Ethics Commission applied new, less restrictive standards for identifying prohibited conduct. Going forward, the Commission will interpret and apply the "appear or practice" clause as its predecessor did in Advisory Opinion No. 99-17, that is to say, to prohibit communications and actions that are intended to influence one's former agency to make a specific decision or to take a specific action. Similarly, the Commission will interpret the backroom services clause to prohibit rendering services to a person or entity in connection with a matter before their former agency in which the agency would be rendering a decision that advances its mission and the public interest. These standards are less restrictive than what had become a near-blanket prohibition on all communication and services, but they are consistent with and they advance the purposes and intent behind the two-year bar.

Notably, applying the State's two-year bar will remain comparatively strict. The federal analogue of the two-year bar, for example, prohibits a former federal government employee from communicating or appearing before any federal agency or court, on behalf of another person or entity, on a matter in which the United States is involved or has an interest, which was pending

under his or her official capacity within one year of leaving government service, but these actions are not prohibited if done on the former employee's own behalf, or on a matter in which the United States is not involved and has no interest, or which was not pending before the former employee in his or her official capacity.<sup>526</sup> There are no comparable exceptions in applying New York's two-year bar.

The Charter of the City of New York broadly prohibits most former City employees from "making communications" with their former agencies, but for only one year following the termination of their employment.<sup>527</sup> Elected officials and other specified high-ranking officials also may not, for one year, "appear" before any agency within the branch of city government in which they served, e.g., the executive or legislative branch.<sup>528</sup> Neither the federal government nor the City of New York impose a restriction analogous to New York's backroom services clause.

As noted, the two-year bar's purpose is not to preclude one from practicing a given trade, profession or occupation, but, rather, to prevent a former employee from unfairly trading on contacts and information garnered while in State service to engage in specific conduct that is intended to influence an official decision.<sup>529</sup> Going forward, former State employees may be permitted to engage

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526 18 U.S.C. § 207(a)(2) provides as follows:

TWO-YEAR RESTRICTIONS CONCERNING PARTICULAR MATTERS UNDER OFFICIAL RESPONSIBILITY.—Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter—

- (A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
- (B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and
- (C) which involved a specific party or specific parties at the time it was so pending, shall be punished as provided in section 216 of this title.

See also, U.S. Office of Government Ethics, *After Leaving Government*, <https://www.oge.gov/web/oge.nsf/Resources/After+Leaving+Government>.

527 New York City Charter, Chapter 68, § 2604(d)(2).

528 New York City Charter, Chapter 68, § 2604(d)(3).

529 See New York State Ethics Comm'n, Advisory Op. No. 94-02.

in employment that requires some measure of contact with their former agency, but the two-year bar will prohibit them from attempting to influence any decision or action by the agency, or to seek from their former agency any information that is not publicly available.<sup>530</sup>

The backroom services clause will not prohibit a former State employee from rendering services to a private entity in relation to a contract with his or her former agency, where the former employee does not participate in preparing work product, or otherwise provide guidance, intended to influence an official decision of the former agency. For example, a former employee of the DOT may assist an engineering firm that is considering a response to a DOT Request for Proposal (RFP) to determine whether the firm has the resources to perform the services outlined in the RFP or to calculate the costs to the firm of performing the services, so long the former State employee's work remains internal to the firm and is not provided to the former State agency. Since the issue is not a matter before the State agency, it does not fall within the scope of the backroom services clause. However, the backroom services clause would prohibit the former DOT employee from participating in calculating prices, determining construction methods, or preparing or assisting in the preparation of any aspect of a proposal that is to be submitted to the DOT in response to the RFP.

### *The Lifetime Bar*

The lifetime bar is contained in Public Officers Law § 73(8)(a)(ii):

No person who has served as a state officer or employee shall, after the termination of such service or employment, appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer or employee on behalf of any person, firm,

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530 The focus on efforts to influence official action is further supported by Advisory Opinion No. 95-23, where the State Ethics Commission held that a former employee of the Department of Transportation (DOT) could apply to the DOT for certification as a minority business enterprise ("MBE") within her two-year bar period. The DOT's role was merely to apply standards for eligibility that were formulated by the federal government, as the agency merely acted as the federal government's agent by reviewing and determining MBE applications for contracts in which the DOT was not directly involved. Moreover, appeals of adverse decisions would be made to the federal government. Under these circumstances, where the DOT's discretion was greatly restricted and the potential for improper influence was negligible, the two-year bar did not prohibit such contact.

corporation or other entity in relation to any case, proceeding, application or transaction with respect to which such person was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration.<sup>531</sup>

The lifetime bar prohibits a former State employee from providing services in relation to any case, proceeding, application, or transaction in which the former employee was directly concerned and in which he or she personally participated, or which was under his or her active consideration while in State service; it does not apply due to a mere acquaintance with the matter at issue.<sup>532</sup> When the former State employee provides such services before a State agency, the bar is absolute and applies regardless of whether the former State employee is compensated for the services. When the former State employee is providing services before any non-State entity, the lifetime bar prevents the former State employee from receiving compensation for those services, but such services may be rendered for free.<sup>533</sup>

Applying the lifetime bar requires identifying the specific “proceeding or application or other matter” involved. Therefore, as the State Ethics Commission recognized in Advisory Opinion No. 90-19, applying the lifetime bar requires examining the specific facts and circumstances of each instance:

The determination of whether the lifetime bar applies . . . is one which must be made on a case-by-case basis; therefore, the Commission cannot, with precision, indicate those matters from which the requesting individual would be permanently barred before any State agency.<sup>534</sup>

Indeed, consistent with precedent, the lifetime bar must be applied much more narrowly than the two-year bar:

Comparing the language of the lifetime bar with the two-year bar . . . the Commission notes that the two-year bar precludes certain services “in relation to any case, proceeding or application or *other matter*”; the lifetime bar speaks to “case, proceeding,

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531 Public Officers Law § 73(8)(a)(ii).

532 New York State Ethics Comm’n, Advisory Op. No. 91-18.

533 New York State Comm’n on Pub. Integrity, Advisory Op. No. 11-03; New York State Ethics Comm’n Advisory Ops. No. 95-19, 95-16, 95-15, 95-07, 93-11, 94-18.

534 New York State Ethics Comm’n, Advisory Op. No. 90-19.

application or *transaction*.” It seems clear that the two-year bar, which is absolute with respect to a former employee’s former State agency, was meant to prohibit the widest possible scope of activities. The lifetime bar, which applies to the prohibited activities before all State agencies, is narrower in scope. The prohibited acts are very specific.<sup>535</sup> (Emphasis added.)

In practice, however, the lifetime bar has not always been applied in this manner. Specifically, the issue of whether “transactions” are the same has presented difficulties when applied in the context of “projects”—endeavors that are large, multifaceted, and tend to continue for an extended time period. For example, Advisory Opinion No. 91-12 considered a former State employee who, during his employment with the State, was assigned to a project that involved renovating a building, including new construction. The former employee was involved in the design phase of this project, which had begun before he commenced employment with the State and continued after his termination of service. According to the former employee, his role in this project was limited to providing guidance for preparing the overall budget and schedule based upon the decisions made by the operating personnel. He presented the schedule and budget information to management, along with various techniques for maintaining normal use of the building during construction. He did not decide upon any facet of the design, as his group was only responsible for providing an accurate budget and schedule for the work. The design was substantially complete when he left State service, but subsequently the primary design consultants had spent “millions of dollars in redesign.”<sup>536</sup>

Subsequently employed by a private construction consulting and management firm, the former employee wished to participate in preparing and submitting a bid for the construction and the work which would result from a successful bid. The State Ethics Commission held that deciding whether the lifetime bar prohibited his participation required determining “whether the [building] improvement project is the *same* transaction with which the former employee was directly concerned and in which he personally participated during the period of his service or employment, or which was under his active consideration then.”

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535 New York State Ethics Comm’n, Advisory Op. No. 91-02 (underlining added).

536 New York State Ethics Comm’n, Advisory Op. No. 91-12.

The State Ethics Commission concluded that it was the same transaction and the former employee was prohibited “from ever participating on the [building] improvement project”:

The changes in the scope and nature of the improvements which occurred after the former employee left State service do not render the project a different transaction from the one with which the former employee was directly concerned and in which he personally participated during the period of his employment. The fact that the exact design of that project has changed does not change the essential nature of the transaction as a reconstruction of the passenger terminal at [the building]. The State agencies, the subject property and the basic concept of reconstruction have not changed to a degree necessary to render this project a different transaction in order to avoid application of the lifetime bar. Despite the representation that the project has changed significantly and other design consultants have been paid millions of dollars to redesign the project, the Commission finds that the “transaction” in which the former employee was involved continues to exist; *the transaction is the continuing reconstruction of [the building]*.<sup>537</sup>

The Opinion did not consider whether the former employee’s prior involvement in the project was limited to the design phase, or that his specific official responsibilities related to budget and scheduling issues, and it did not examine, at all, his specific proposed responsibilities in the construction phase. Every aspect of the entire project was held to constitute a single transaction to which the lifetime bar applied.

Advisory Opinion No. 95-06 involved a former employee of the New York State Department of Environmental Conservation (DEC) who was assigned as Project Engineer on a remedial investigation and feasibility study of a municipal landfill, pursuant to a consent order. The DEC released its remedial investigation report and feasibility study subsequent to the requesting individual’s departure from State service. Thereafter, the DEC issued a proposed remedial action plan (PRAP) which described the remedial alternatives considered for the site, identified the alternative preferred by DEC, and provided the rationale for this

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537 *Id.* (emphasis added).

preference. The PRAP solicited public comments pertaining to all the remedial alternatives evaluated, as well as the preferred alternative. After holding a public hearing on the PRAP, and receiving other comments on the PRAP, the DEC issued a Record of Decision outlining the specific work proposed to be done. Pursuant to a new consent order, the former State employee's private sector employer was awarded—after a bidding process—the engineering contract for the remediation work. The former employee asked if he would be permitted to participate in this aspect of the project.

It was determined that the lifetime bar prohibited him from participating in the remediation stage of the project:

. . . despite all the intervening events, the essence of the transaction—its subject and purpose, the parties interested and affected, and the ultimate goal—remains constant. It addresses the same landfill's cleanup as originally studied when [the requesting individual] was the Project Engineer. Therefore, the Commission concludes that [the requesting individual's] performance of services as an environmental engineer pursuant to the amended consent order would constitute his rendering services on a transaction on which he worked while in State service.<sup>538</sup>

In reaching its conclusion, the State Ethics Commission did not consider the fact that the requesting individual's participation in the initial stage of the project was limited to investigation, or that he left State service before the final remediation plan was even selected. It found that the relevant transaction encompassed the entire project from initial investigation through final construction, and the lifetime bar prohibited the former employee's involvement in all aspects of the project.

In Advisory Opinion No. 97-09, the requesting individual was a former employee of DOT who had participated in the planning stages and early construction phase of a highway construction project that was projected as a three-stage project. His involvement was largely limited to "Stage I", although some elements of his work were relevant to the later phases. Specifically, between 1970 and 1984, he was required to review the design recommendation for the project, and coordinate the technical review of structural plans. His unit also reviewed the structural plans to insure compliance with certain standards and to ensure the data agreed with that used for highway design. All

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538 New York State Ethics Comm'n, Advisory Op. No. 95-06.



this work concerned the larger project then under consideration. Subsequently, the project was downsized to Stage I, while the balance of the original project—unofficially referred to as Stages II and III—was left for design and construction at a later date.

When the former employee left State service in 1987, there was still no serious discussion of progressing to Stages II and III, although it was generally recognized that at some point Stages II and III would have to be built. Ten years later, DOT advertised for consultant firms to submit expressions of interest in the design of Stages II and III of the project, and the former employee asked whether he could work on those aspects of the project. It was determined that his participation in Stages II and III were prohibited by the lifetime bar:

In [the requesting individual's] case, it is clear that he personally participated and was directly concerned with Stage I of the highway project, which was completed in 1989. However, this was not a project where Stage I was first designed and completed, with Stages II and III to be proposed at a later date. Rather, the initial design of the interchange project, beginning in 1970, was for the entire project. Between 1970 and 1984, work on the interchange assumed that the then proposed project would be constructed. [The requesting individual] played a role in those early years. . . . With this history, the individual stages of the project cannot each be viewed as a separate transaction. [The requesting individual], at the early stages, worked on essentially the same project on which he now seeks to work.<sup>539</sup>

The individual's inquiry to the State Ethics Commission was triggered by DOT's solicitation of bids for the design of Stages II and III. However, the individual's involvement—which had ended *more than 13 years earlier* in design issues that had applicability to Stages II and III—barred his participation in the entire project.

Advisory Opinions Nos. 97-09, 91-12 and 95-06 did not distinguish or acknowledge the holding in Advisory Opinion No. 91-02: the lifetime bar only “prohibit[s] acts [that] are very specific.”<sup>540</sup> All three Opinions held that the lifetime bar prohibited former State employees from every activity related to

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539 New York State Ethics Comm'n, Advisory Op. No. 97-09.

540 *See, supra* at p.11.

large projects in which they had played limited roles regardless of when such roles were played.

### *The Lifetime Bar Going Forward*

The State Ethics Commission recognized that the lifetime bar of POL § 73(8) is an “extraordinary limitation” intended to restrict former employees from using “specific inside knowledge about a case, proceeding, application or transaction. . . .”<sup>541</sup> A mere “acquaintance with or knowledge of a fact or circumstance is insufficient to trigger the lifetime bar. More is needed—active involvement in the nature of both personal participation and direct concern or active consideration of the transaction.”<sup>542</sup> Generally this means that the lifetime bar will attach only to “very specific” acts.<sup>543</sup>

It is the view of the Commission that the line of Opinions addressing the lifetime bar’s application to projects reflects an expansive interpretation of the term “transaction” that is not mandated by the statute and departs from the precedent established in Advisory Opinion No. 91-02. While most “projects” may be sufficiently discrete to constitute a single transaction for lifetime bar purposes, applying this concept across the board produces prohibitions of excessive scope that have caused undue hardship for some former State employees and State agencies seeking talent in the private sector.

A large infrastructure construction project is not necessarily a single transaction for lifetime bar purposes.<sup>544</sup> For example, a State employee who participated in a ground-level environmental study on a project need not automatically be barred for life from participating with a private contractor, years later, in inspection work on the same “project” absent a showing of “*both* personal participation *and* direct concern or active consideration” with respect to the inspection work.<sup>545</sup> The lifetime bar demands greater specificity.

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541 New York State Ethics Comm’n, Advisory Op. No. 91-02, citing, New York State Ethics Comm’n Advisory Op. No. 90-16.

542 New York State Ethics Comm’n, Advisory Op. No. 91-02 (emphasis in original).

543 *See, Id.*

544 This analysis is not limited to construction projects. Since the lifetime bar is applied on a case-by-case basis, this analysis may be applied to any scenario where it is appropriate under the specific facts presented.

545 *Id.*

Going forward, the Commission will consider such questions, as it must, on a case-by-case basis.<sup>546</sup> A non-exhaustive list of factors the Commission will consider when determining whether the lifetime bar applies in the context of a large project include: (1) the general nature of the project; (2) the phases of the project involved; (3) the nature of the work performed as a State employee and the nature of the work projected to be performed; (4) the extent to which the projected work constitutes a continuation of the earlier work; (5) the identities of other persons and/or entities directly involved in the earlier work and in the projected work; and (6) intervening changes in design, methods, or technology.

## CONCLUSION

The post-employment restrictions are a key part in promoting public confidence in State government, and maintaining—in fact and appearance—the integrity of official decisions and actions. The purpose of this Advisory Opinion is not to narrow the application of the post-employment restrictions, but to clarify and resolve certain difficulties and ambiguities in the restrictions’ application and better align practice under the law with the law’s underlying policy objectives in the manner summarized below.

Going forward, the Commission will interpret the appear or practice clause of the two-year bar to prohibit efforts to influence a decision or action by the State agency, or to seek from the agency any information that is not publicly available. Similarly, the backroom services clause of the two-year bar will prohibit a former State employee from rendering services to a private entity, in relation to a matter that is before his or her former agency, where the former employee prepares work product, or otherwise provides guidance, that is intended to influence an agency decision or action.

Finally, when applying the lifetime bar, the Commission will examine various factors discussed herein to determine whether a “project” constitutes a single transaction. The non-exhaustive list of factors the Commission will consider when determining whether the lifetime bar applies in the context of a large project include: (1) the general nature of the project; (2) the phases of the project involved; (3) the nature of the work performed as a State employee and the nature of the work projected to be performed; (4) the extent to

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546 New York State Ethics Comm’n, Advisory Op. No. 90-19.

which the projected work constitutes a continuation of the earlier work; (5) the identities of other persons and/or entities directly involved in the earlier work and in the projected work; and (6) intervening changes in design, methods, or technology.

**Concur:**

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*Dated: October 30, 2018*

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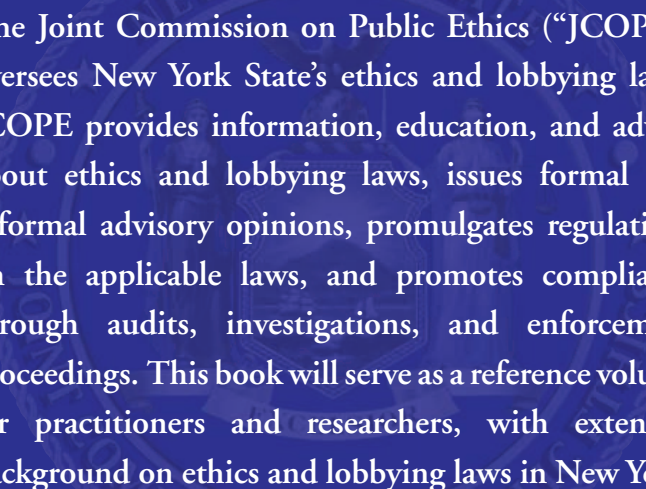
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